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FEDERAL COMMUNICATIONS COMMISSION REPORTS
(100 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 100 (2d Series)
Pages 525 to 1117

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Action, Appealable

Review Board affirms ALJ's dismissal of an application in a remand proceeding where that applicant had lost in an initial Decision prior to remand and had failed to except to the Initial Decision.
—*South Florida B/cing Company, Inc.*
BC Docket No. 82-731

Advertising, Program-Length Commercials

Commission denied petition seeking rule that would prohibit profit-sharing arrangements in airing of children's programs. Given the absence of any substantial showing of need for suggested rule and potential harm of eliminating source of funding for children's television, proposal found inadvisable.
—*Children's Programming*

Amicus Curiae

Applicant with 100% local residence, moderate credit for civic involvement and slight credit for broadcast experience awarded slight integration preference over applicant with 100% minority ownership and slight credit for civic involvement, where both applicants propose 100% integration. Slight coverage preference awarded to applicant that will bring new third and fourth nighttime service to 3616 people. NBMC allowed to file *amicus* brief.
—*Radio Jonesboro, Inc.*
BC Docket No. 82-641

Application, Certification of

In hearing matter of mutually exclusive CP applications for FM station in Lamar, Review Board reverses ALJ's grant and awards it to a competing applicant. The Board held that two demerits against FM 105 outweighed its slight integration preference.
—*Broadcast Associates of Colorado*
MM Docket No. 83-1218

Application, Dismissal of

(See: Action, Appealable-*South Florida B/cing Company, Inc.*)

Authority Delegated, Basis for Review of

By Direction Letter adopted reaffirming Commission forfeiture policies as they apply to cable television system operators. The Commission upholds, on review, the action of the Chief, Mass Media Bureau, denying a Petition for Declaratory Ruling which challenged

the retrospective applicability of a 1983 implementing amendment to the Commission's forfeiture provision in Section 1.80(d) of the Rules.
—*Sol Schildhause*

Billing Practices
Notice of Proposed Rulemaking adopted to detariff billing and collection services and examine the possibility of imposing a nationwide prohibition of local exchange service disconnections for nonpayment of interstate toll charges.
—*Billing/Collection Services*
CC Docket No. 85-88

Broadcast Experience, see also comparative criteria
(See: Amicus Curiae-*Radio Jonesboro, Inc.*)

Broadcast Record, Past
Review Board reverses ALJ's grant of CP and awards it to competitor. The Board credited an integration commitment that became finalized before exchange of exhibits and took into account a managerial broadcast interest where applicant failed to make resignation commitment before "B" cut off date. Winner prevailed on integration and past broadcast record factors.
—*Northland Communications*
MM Docket No. 85-961

Candor
(See: Application, Certification of-*Broadcast Associates of Colorado*)

CATV Carriage, Mandatory Signal
Application for review of delegated denial of signal carriage rule waiver denied. Mandatory signal carriage rules not affected by 1984 amendments to Communications Act.
—*WACCO, Inc.*

CATV Certificate of Compliance Processing Held in Abeyance
(See: Authority Delegated, Basis for Review of-*Sol Schildhause*)

CATV Jurisdiction Over, By Local Municipality
Commission reiterates that cable system, under federal preemption policies are free to add to, delete from, or realign their service offering as long as the "must-carry" signals are retained as part of the basic service offering.
—*Cox Cable New Orleans, Inc.*

CATV Registration Procedure

(See: Authority Delegated, Basis for Review of-*Sol Schildhause*)

Cellular Communications Systems

Initial Decision affirmed granting nonwireline cellular application where one applicant's proposed system covers more area and population, its identification and analysis of demand was more reliable, and its proposed system will retain greater flexibility to expand in response to increasing demand overcomes opponent's slight preference for its usage sensitive rate structure (not rate levels).

—*Celcom Communications Corp.*

CC Docket No. 83-101

Character Qualifications, Abuse of Process

Commission affirms and modifies Review Board Decision renewing license and denying mutually exclusive applications. Where license held in deferred status, renewal expectancy based on most recent license term after filing of competing applications. No character issue added for alleged abuse of process by employees of co-owned station.

—*Intercontinental Radio, Inc.*

BC Docket No. 81-890

Children, Advertising

(See: Advertising, Program-Length Commercials-*Children's Programming*)

Children, See Programming

(See: Advertising, Program-Length Commercials-*Children's Programming*)

Civic Participation, Effect of

Review Board affirmed ALJ's comparative selection of FM permittee whose slight overall ownership integration preference exceeded opponent's very slight comparative coverage preference. No credit was given to contingent integration proposal. Residence and civic participation were evaluated separately and 7-15 year old activities were credited.

—*Northern Sun Corporation*

MM Docket No. 83-1050

(See Also: Amicus Curiae-*Radio Jonesboro, Inc.*)

Common Carrier

The Commission issues a Memorandum Opinion and Order regarding the Commission's general policy direction on transatlantic fiber optic submarine cable systems as proposed in applications filed by Tel-Optik Limited and Submarine Lightwave Cable Company.
—Tel-Optik Limited

Common Carrier, Data Processing Service

Waivers are granted conditionally of the requirement that certain enhanced services provided by carriers subject to structural separation under *Computer II* be performed outside of their central offices. The specific services addressed are asynchronous/X.25 protocol conversion, and three conditions are adopted to promote the carriers' obligation not to discriminate in the provision of basic service, and to promote meaningful competition.
—Waiver of Section 64.702

Common Carrier, Interconnection

Commission adopted Report and Order that (a) established a timetable for the implementation of equal access by independent telephone companies and (b) recommended proposed institutional arrangements for joint planning among carriers for conventional and NSEP communications facilities planning.
—MTS/WATS Market Structure
CC Docket No. 78-72 (Phase III)

(See: Common Carrier, Data Processing Service-*Waiver of Section 64.702*)

Common Carrier, International

Report and Order adopted amending traffic data reporting requirements for international telecommunications carriers.
—Amendment of Section 43.61
CC Docket No. 79-262

Common Carrier, Specialized Services

(See: Common Carrier, Data Processing Service-*Waiver of Section 64.702*)

Comparative Coverage Issue

(See: Civic Participation, Effect of-*Northern Sun Corporation*)

Comparative Coverage Issue, see also coverage

(See: Amicus Curiae-*Radio Jonesboro, Inc.*)

Comparative Criteria

(See: Cellular Communications Systems-*Celcom Communications Corp.*)

Comparative Hearing

(See: Cellular Communications Systems-*Celcom Communications Corp.*)

Comparative Issue. Contingent

In hearing matter of mutually exclusive CP applications for new FM station in North Las Vegas, Review Board reverses ALJ's grant, which was based on a dispositive § 307(b) preference, and awards it to competing applicant on the standard comparative issue.

—*Debra D. Carrigan*

MM Docket No. 83-858

Computer II

Memorandum Opinion and Order adopted approving capitalization plans for subsidiaries of the regional Bell operating companies. In its *BOC Separation Order* the Commission permitted the divested regional Bell operating companies (RBOCs) to offer enhanced services and customer premises equipment (CPE) pursuant to a modified form of the structural separation conditions established in the *Second Computer Inquiry.* Pursuant to the Order, the regions filed a total of thirteen capitalization plans.

—*GTE Telenet Communications Corp.*

Contour, Measurements

The Commission does not consider terrain shadowing studies in its evaluation of low power television and television translator applications, since there is no universally accepted method of predicting the effects of terrain shielding. The Commission will not grant waivers of its policy not to consider terrain shielding based on promises by parties to resolve future interference.

—*Apogee B/cing Corp.*

Declaratory Ruling

(See: CATV Jurisdiction Over, By Local Municipality-*Cox Cable New Orleans, Inc.*)

Deregulation

(See: Billing Practices-*Billing/Collection Services*)

Diversification
(See: Broadcast Record, Past-*Northland Communications*)

Diversification of Control of Mass Media
Review Board awarded slight to moderate diversification of media control preference to applicant with 98% attributable ownership interest in small UHF TV station located 26 miles away from proposed FM community of license versus applicant with 100% interest in in-town daytime-only 500-watt AM station which is the only broadcast facility licensed to proposed FM community. This preference outweighed opponent's very slight ownership integration preference.
—*J.B. B/cing of Texas, Inc.*
MM Docket No. 83-1273
(See Also: Civic Participation, Effect of -Northern *Sun Corporation*)

Domestic Communications Satellite, See Satellite
Commission denied request for financial certification. Construction permits and launch authorizations granted *Advanced Business Communications, Inc.*, 94 FCC 2d 1 (1983), declared null and void due to failure to comply with conditions imposed on authorizations.
—*Advanced Business Communications, Inc.*

Domestic Fixed Satellite
(See: Domestic Communications Satellite, See Satellite-*Advanced Business Communications, Inc.*)

Environmental Impact
Application's for review denied. Where site of a television tower is a national landmark and is also eligible for inclusion in the National Register of Historic Places, 50-foot increase in height is minor environmental action because the tower would be only 140 feet above ground level and because it would be in an antenna farm.
—*First Century B/cing, Inc.*

Failure to Prosecute
(See: Action, Appealable-*South Florida B/cing Company, Inc.*)

Female Ownership-Participation, Comparative Credit for
Review Board remands comparative FM broadcast proceeding and adds issues on reciprocal service (Section 307(b)) and special sensitivity to minority and/or female needs and viewpoints. Nevertheless, programming evidence may only be considered in relation to the

added issues if applicant makes the requisite "threshold showing" and seeks a separate programming issue.
—*Chase Communications Co.*
MM Docket No. 83-554

Fiber Optic Calbe Systems
(See: Common Carrier-*Tel-Optik Limited*)

FM Station, Authorization
Review Board affirmed *I.D.* grant based on dispositive Section 307(b) preference to applicant proposing first local transmission service to viable independent community of 2,050 persons. Losing applicant proposed to serve a nearby town of 22,940 people which already possessed local service.
—*Skipko Broadcasting, Inc.*
MM Docket No. 83-275

Forefeiture Authorization
(See: Authority Delegated, Basis for Review of-*Sol Schildhause*)

Forefeiture Corrective Action Subject to Citation, Effect of
(See: Authority Delegated, Basis for Review of-*Sol Schildhause*)

Forefeiture Procedures
(See: Authority Delegated, Basis for Review of-*Sol Schildhause*)

International Agreements and Treaties
First Report and Order adopted setting forth findings in an Inquiry relating to preparation for an International Telecommunication Union World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing it (Space WARC), and conveying to the Department of State recommended Initial Proposals for the Conference first session.
—*Space Warc*
Gen. Docket No. 80-741

The findings and proposals closely parallel the first session agenda, focusing largely on the issues posed in the key agenda item dealing with new planning approaches. They indicate that for the most intensely used frequency bands of the Fixed-Satellite Service, a range of alternative international arrangements for preventing harmful interference between satellite systems can be considered.

However, such arrangements must be pragmatic and workable and contain several key features described in the Report and Order.
—*Space WARC*
Gen. Docket No. 80-741

International Telecommunications Union
(See: International Agreements and Treaties-*Space WARC*)

Issue, Enlargement of, Denied
(See: Character Qualifications, Abuse of Process-*Intercontinental Radio, Inc.*)

Jurisdiction of FCC, Generally
Notice of Proposed Rulemaking adopted to preempt state and local zoning regulations to the extent that they have the effect of unreasonably discriminating against satellite receive-only antennas in favor of other communications facilities, and lack a direct and tangible relationship to valid, demonstrable and clearly articulated health, safety or aesthetic objectives and do not constitute the least restrictive method available to accomplish such objectives.
—*Local Zoning Regulations*
CC Docket No. 85-87

Licenses, Conditions Relating to
(See: Domestic Communications Satellite, See Satellite-*Advanced Business Communications, Inc.*)

License, Renewal of, See also Renewal, or Application
(See: Character Qualifications, Abuse of Process-*Intercontinental Radio, Inc.*)

Local Residence, see also comparative criteria
(See: Amicus Curiae-*Radio Jonesboro, Inc.*)

Minority Ownership, Factor in Comparative Proceeding
(See: Female Ownership-Participation, Comparative Credit for-*Chase Communications Co.*)
(See Also: Amicus Curiae-*Radio Jonesboro, Inc.*)

Mobile Radio Service, Cellular Applications
(See Also: Cellular Communications Systems-*Celcom Communications Corp.*)

National Defense
(See: Common Carrier, Interconnection-*MTS/WATS Market Structure*)

National Environmental Policy Act of 1969
Report and Order adopted amending §1.1305 to add to the list of "major actions" a category of operations and facilities applicable to health and safety guidelines for human exposure to radiofrequency electromagnetic radiation. Applications for such facilities will be created as "major actions" as provided in the FCC Rules implementing the National Environmental Policy Act of 1969.
—*Amendment of Part 1*
Gen. Docket No. 79-144

Further Notice of Proposed Rule Making adopted proposing to amend §1.1305 to exclude from provisions of §1.1305(d) specific categories of facilities that transmit relatively low levels of radiofrequency electromagnetic radiation, Also, proposes to include shipboard satellite-earth terminals in the category of facilities to which §1.1305(d) applies.
—*Amendment of Part 1*
Gen. Docket No. 79-144

Ownership and Management, Integration of
(See: Application, Certification of-*Broadcast Associates of Colorado*)

(See Also: Diversification of Control of Mass Media-*J.B. B/cing of Texas, Inc.*)

(See Also: Broadcast Record, Past-*Northland Communications*)

(See Also: Civic Participation, Effect of-*Northern Sun Corporation*)

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(See: Advertising, Program-Length Commercials-*Children's Programming*)

Programming Childrens
(See: Advertising, Program-Length Commercials-*Children's Programming*)

Programming Comparison
(See: Female Ownership-Participation, Comparative Credit for-*Chase Communications Co.*)

Programming Meritorious
(See: Character Qualifications, Abuse of Process-*Intercontinental Radio, Inc.*)

Programming Past
(See: Character Qualifications, Abuse of Process-*Intercontinental Radio, Inc.*)

Qualifications, Financial
(See: Domestic Communications Satellite, See Satellite-*Advanced Business Communications, Inc.*)

Radiation
(See: National Environmental Policy Act of 1969-*Amendment of Part 1*)

Radiation, Electromagnetic, Hazardous Level
(See: National Environmental Policy Act of 1969-*Amendment of Part 1*)

Radiation, Exposure
(See: National Environmental Policy Act of 1969-*Amendment of Part 1*)

Radiation, Radio Frequency
(See: National Environmental Policy Act of 1969-*Amendment of Part 1*)

Reciprocal Service
Reciprocal service doctrine repealed. Doctrine will no longer be available to permit full comparative consideration for an applicant proposing to serve a disfavored community under section 370(b). —*Public Service B/cing of West Jordan, Inc.*
BC Docket No. 82-366

(See Also: Female Ownership-Participation, Comparative Credit for-*Chase Communications Co*)

Remand
(See: Female Ownership-Participation, Comparative Credit for-*Chase Communications Co.*)

Reconsideration, facts not previously presented
Signing of a construction contract does not present new facts or changed circumstances to warrant reconsideration where Commis-

sion was explicitly aware of imminent possibility of contract signing in making its decision and decision was based on failure to sign contract in timely manner.
—*Graphic Scanning Corporation*

Reconsideration, grounds for
(See: Reconsideration, facts not previously presented-*Graphic Scanning Corporation*)

Renewal, Applicant v. New Applicant
(See: Character Qualifications, Abuse of Process-*Intercontinental Radio, Inc.*)

Reports to FCC
(See: Common Carrier, International-*Amendment of Section 43.61*)

Review Application For
(See: CATV Carriage, Mandatory Signal-*WACCO, Inc.*)

Satellite, Direct Broadcast
Commission will not reconsider its decision to cancel conditional construction permit due to failure to timely enter construction contract where construction contract is subsequently entered after due diligence deadline and after Commission action.
—*Graphic Scanning Corp.*

Satellite Domestic Communications
(See: Domestic Communications Satellite, See Satellite-*Advanced Business Communications, Inc.*)

Satellite Earth Station
(See: Jurisdiction of FCC, Generally-*Local Zoning Regulations*)

Satellite Orbit
(See: International Agreements and Treaties-*Space WARC*)

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(See Also: Reciprocal Service-*Public Service B/cing of West Jordan, Inc.*)

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Domestic Communications Satellite, See Satellite
Domestic Fixed Satellite
Licenses, Conditions Relating to
Qualifications, Financial
Satellite Domestic Communications

Commission denied request for financial certification. Construction permits and launch authorizations granted *Advanced Business Communications, Inc.*, 94 FCC 2d 1 (1983), declared null and void due to failure to comply with conditions imposed on authorizations. —*Advanced Business Communications, Inc.*

FCC 85-57

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Advanced Business Communications, Inc.	File No. 805-DSS-MP-84
Certification of Financial Qualifications, Request for Modification of Construction Permits, and Request for Authority to Offer Transponders on a Noncommon Carrier Basis	
Request for Reassignment of Orbital Location	File No. 2187-DSS-MP/ML-84

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1985; Released: February 27, 1985

BY THE COMMISSION:

I. Summary

1. On April 27, 1983, the Commission authorized Advanced Business Communications, Inc. (ABCI) to construct and operate a new domestic communications satellite system. It was to consist of two in-orbit satellites operating at 12/14 GHz and one on-ground spare.[1] ABCI admitted that it

[1] *Advanced Business Communications, Inc.*, 94 FCC 2d 1 (1983) (*Authorization Order*).

could not at that time demonstrate the financial qualifications necessary to construct and operate its proposed system. Nevertheless, in an attempt to promote new entry and competition in the domestic satellite industry, we issued ABCI construction and launch authorizations conditioned on its demonstrating its full financial qualifications, as set forth in our *Reduced Spacing Order*,[2] no later than December 31, 1983. If these conditions were not met, the authorizations became null and void. On December 30, 1983, ABCI submitted a "Certification of Financial Qualifications" and other requests.[3] In its certification, ABCI asserts that it has fulfilled the financial condition of its authorizations by entering into a series of agreements with Hughes Aircraft Company (Hughes) and its subsidiaries.[4] These agreements provide that Hughes will construct and finance ABCI's satellites, and that Hughes' subsidiaries will provide launch and marketing services, as well as telemetry, tracking and control (TT&C) and other transponder maintenance services to ABCI and its customers. Finally, an option is provided to Hughes to buy 95.1% of the stock of ABCI.

2. Five parties filed comments, objections or petitions to deny ABCI's request for certification.[5] The commenting parties all assert that ABCI has failed to demonstrate that it is financially qualified to construct and operate its satellite system. They also argue that the arrangements with Hughes and its subsidiaries constitute an unauthorized *de facto* transfer of control and that approval of these arrangements would provide Hughes with two additional orbital locations to the detriment of the current group of domestic satellite applicants. In its reply, ABCI denied the commenters' allegations, but nevertheless amended its agreements with Hughes and

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[2] *Report and Order*, 48 Fed. Reg. 40233 (September 6, 1983).

[3] These included a request for certain technical modifications of ABCI's construction permit and a request to sell transponders on a noncommon carrier basis.

[4] The proposed arrangement is contained in a series of five contracts between ABCI and Hughes, Hughes Communications Satellite Services, Inc. (HCSS) or Hughes Communications Galaxy, Inc. (Galaxy). ABCI requested confidentiality for portions of these contracts pursuant to Sections 0.457 and 0.459 of the Commissions Rules, 47 C.F.R. §§ 0.457 and 0.459. Although this request was initially denied by the Common Carrier Bureau under delegated authority, *see* letter dated March 26, 1984 from Chief, Common Carrier Bureau, the matter has been appealed to the General Counsel and is pending.

[5] American Satellite Company (American Satellite), GTE Spacenet Corporation (Spacenet) and Satellite Television Corporation (STC) filed comments. Western Union Telegraph Company (Western Union) filed a petition to deny and RCA American Communications, Inc. (RCA) filed an objection. We grant Spacenet's Motion for Leave to Accept Late-Filed Pleadings, and accept into the record a late filed letter from ABCI because doing so will not delay this proceeding and will provide a fuller record upon which to make our decision. In view of our finding that ABCI did not fulfill the financial conditions attached to its permits and authorizations, we dismiss Western Union's petition to deny as moot.

its affiliates to remedy some of the objections. Responses to the amended agreements were filed by all commenting parties.

3. For the reasons discussed below, we reject ABCI's "Certification of Financial Qualifications," and dismiss as moot ABCI's other requests. We find that the ABCI-Hughes agreements do not satisfy the financial condition of ABCI's authorization and we do not reach the other allegations made by the parties. Because ABCI has not fulfilled the conditions of its authorizations, its authorizations are null and void by operation of law.

II. Introduction

A. Background

4. The novel approach we took in issuing ABCI its domestic satellite authorizations relied heavily on ABCI's representation that grant of its applications would result in the entry of a new and independent communications company. Absent the prospect of a new entrant, we would have taken a more conventional approach and required evidentiary proof of financial qualifications before authorizing the construction of ABCI's satellites. ABCI urged us not to do so, arguing that enforcing conventional financial qualifications standards would result in the exclusion of new entrants not having large capital resources. According to ABCI, based on its negotiations with financial institutions, the primary factor preventing it from obtaining financing for its satellites was the lack of a construction permit. ABCI argued that allowing it to obtain financing with a construction permit in hand would:

> . . . stimulate competition among satellite carriers, create a new dynamic communications company and prevent domination of the United States domestic satellite carrier industry by a few dominant ones. . . .[6]

ABCI further stated that:

> . . . because ABCI is a new entrant to the domestic satellite common carrier business, it will not dominate the market, but ensure continuing competition for the public good. In contrast to according additional orbital arc locations to presently approved operators for increases of their dominance through enlarged space segment capacity, the Commission, by approving the instant applications, will show the effectiveness of the Commission's own policy, shaped during the last few years.[7]

According to ABCI,

> . . . preservation of a true open entry policy by the Commission is in reality possible only if new entrants are allowed to demonstrate that the financing for an undertaking of [this] magnitude . . . can be obtained by other than large long-established entities, or those with long-established parent or affiliated companies.[8]

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[6] ABCI application at 1-25.

[7] *Id.* at 1-25.

[8] *Id.* at 1-28.

For these reasons, ABCI stated, it should be preferred over the few substantial corporations that it alleged have economic power or dominance in the communications field.

5. Relying on these representations, we agreed to provide an opportunity for ABCI to establish its own domestic satellite system and obtain financing with a construction permit in hand.[9] We did so because we believe that opportunities for new entry increase the likelihood of innovation and improved efficiencies in the use of the orbit-spectrum resource to the benefit of the using public.[10] The United States Court of Appeals for the District of Columbia Circuit has affirmed our view that competition benefits the satellite industry, stating that:

> the presence of a large number of competitors and a large capacity may prevent supracompetitive price pressures that the Commission might not be able to perceive or control. [And], the increased competition may spur firms in the industry to greater technological advances and more efficient operations.[11]

We therefore believed that if ABCI succeeded, it would, as a new entrant, increase competition and encourage the provision of innovative services.

6. Thus, ABCI was granted conditional construction permits and licenses and was given eight months to secure the necessary financing. Specifically, we required ABCI "to arrange [its] financing and to execute spacecraft construction and launch services contracts by December 31, 1983."[12] We emphasized that it was to submit the schedule of payments to which it was committed and to provide written evidence of irrevocably committed funds to meet the payment schedule. On December 30, 1983, ABCI filed with the Commission its Certification, maintaining that it had successfully met the conditions of its authorizations.

B. The ABCI-Hughes Arrangements

7. ABCI asserts that through its series of agreements with Hughes and Hughes' subsidiaries, it has secured the required financing and satellite construction and launch service contracts. According to ABCI, it entered into these agreements with Hughes because conventional financing was too difficult to bring to fruition in the time period allotted. Under the agreements, Hughes is to deliver to ABCI two $^{12}/_{14}$ GHz band satellites of Hughes' new HS-393 configuration.[13] Hughes is to finance the

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[9] In addition to ABCI, two other applicants, United States Satellite Systems, Inc. and Rainbow Satellite, Inc., were granted identically conditioned authorizations. *Rainbow Satellite, Inc.*, 94 FCC 2d 437 (1983); *United States Satellite Systems, Inc.*, 94 FCC 2d 462 (1983).

[10] *See Domestic Fixed-Satellite Service re: Amendment Part 25*, 84 FCC 2d 318 (1981).

[11] *U.S. v. FCC*, 652 F.2d 72, 104 (D.C. Cir. 1980).

[12] *Reduced Orbital Spacing, Supra* note 2, at para. 65.

[13] ABCI asserts that it no longer needs an on-ground spare and seeks to surrender its construction permit for this satellite.

transponders on the first satellite to be launched, and will be entitled to a commission on sales if it meets certain sales goals. HCSS is to provide ABCI with launch services, which include reserving a launch date from NASA, transporting the satellite to the launch site, procuring the launch vehicles and obtaining insurance. HCSS will finance the procurement of these services. HCSS will also provide tracking, telemetry and control (TT&C) services for the satellites. ABCI is not required to reimburse Hughes for any of its financing until ABCI receives revenue from transponder customers, although Hughes may, in its sole discretion, receive payments directly from customers. Finally, the president, founder and principal stockholder of ABCI, Dr. Matt Nilson, has granted Galaxy an option to purchase all his ABCI stock. Under this agreement, Galaxy may acquire 95.1% of ABCI's stock, subject to FCC approval. This contract is exercisable no later than three years from the signing of the agreement, or one year from the launch of the first satellite, whichever comes later.

8. In response to criticisms from the commenting parties, ABCI later amended its agreements with Hughes. ABCI claims these changes further substantiate its independent position and moot the commenters' challenges. The amendments require ABCI to pay a fixed price for the satellites, rather than the previous price of 96% of the revenues received from transponder customers. Additionally, ABCI states that it now has the ability, under certain circumstances, to reject customers for transponders and to terminate its contract with HCSS for the provision of TT&C. Furthermore, ABCI claims it has the right to attend design and flight readiness reviews for the satellites, to hire and fire personnel, to hire a chief operating officer, and to approve customer requested technical modifications along with Hughes. All launch costs, as they are incurred, will be certified to ABCI.

III. Arguments

9. The parties filing in opposition to ABCI raise five reasons why the authorizations should be declared null and void. Although we need not make findings on each of these points, we will summarize them in some detail so that all the issues are clearly set forth. The reasons offered as supporting a voiding of ABCI's authorizations are as follows: (a) ABCI has not complied with the conditions of its authorizations; (b) the ABCI/Hughes agreement is an unauthorized transfer of control of a Title III license in violation of Section 310 of the Communications Act; (c) the unauthorized transfer of control also violates Sections 301 and 304 of the Communications Act; (d) the proposed transaction violates the Commission's processing procedures and unfairly disadvantages other applicants; and (e) the ABCI/Hughes agreement is inconsistent with ABCI's prior

representations to the Commission and undercuts the basis of the authorizations.

A. ABCI Has Not Complied With the Conditions of its Authorizations

10. The parties contend that the authorizations granted to ABCI are null and void by their express terms because ABCI has not met the conditions of the authorizations. They argue ABCI has not demonstrated that it is independently financially qualified to construct and operate its proposed system. Thus, they urge that the Commission find the authorizations null and void.

B. The ABCI/Hughes Agreement is an Unauthorized Transfer of Control of a Title III License in Violation of Section 310 of the Communications Act

11. Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), prohibits the transfer of control of a corporation holding a construction permit without prior Commission approval.[14] This prohibition encompasses all forms of control, *de facto* as well as *de jure.*[15] The Commission requires that the licensee maintain effective and consistent actual control of the facility so that the party licensed to operate the station retain ultimate responsibility for station performance.[16] In the present case, the opposing parties argue that there has been a *de facto* transfer of ABCI's construction permits to Hughes.[17]

12. The parties state that in determining whether a *de facto* transfer has occurred, the Commission has looked beyond the nominal ownership of the facilities to the totality of the circumstances presented.[18] Although there is no exact formula for determining whether control has passed, they claim the Commission has focused on a number of factors. These include provision and control of finances, control of day-to-day operations, control of programming, and the right to acquire the licensee. A transfer of control has been found when an entity other than the licensee has the "right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue."[19] In response, ABCI contends that factors which are dispositive of the matter of control in a

[14] Such approval is also a condition of ABCI's construction permit. *See Authorization Order* at 4.

[15] *Stereo Broadcasters, Inc.*, 55 FCC 2d 819 (1975).

[16] *George E. Cameron, Jr. Communications*, 91 FCC 2d 870, 875 (1982). *See Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023, 1025 (1982).

[17] The parties concede that the permit is still held by ABCI as a legal matter and thus *de jure* control has not been transferred.

[18] *Blue Ribbon Broadcasting, Inc., supra* note 16; *Stereo Broadcasters, Inc.*, 55 FCC 2d at 821.

[19] Reply comments of GTE Spacenet Corporation, citing *WHDH, Inc.*, 17 FCC 2d 856, 863 (1969).

broadcast context should not be determinative for a new technology. It states that very few banks, manufacturers or service providers have experience in this capital intensive industry, so the range of potential suppliers in the domestic satellite service is much smaller than in the broadcast service.

1. Financing

13. The commenters argue that through the financing arrangements in the ABCI-Hughes contracts, Hughes has assumed control of ABCI's operations. According to the commenters, provision of and control over the licensee's finances is one of the most powerful and effective methods of controlling the facility.[20] They cite a range of precedent on the financial control point. The Commission has found that a party who is the sole provider of funds to a station has control.[21] Parties who simply advance funds to the licensee for the station's construction and first year expenses have been found to have control.[22] A transfer of control was also found when a lender was providing a station with operating expertise and operating loans were to be repaid to the lender only to the extent that station revenues exceeded operating expenses.[23] In addition, the Commission concluded that when a party had paid the entire price for purchasing a station, and had agreed to retain all profits from a station and absorb all the facility's losses, a substantial question of *de facto* transfer of control was raised.[24]

14. The parties state as follows: under the ABCI-Hughes agreements, Hughes, or a Hughes subsidiary, is financing the construction, launch and operation of the satellites.[25] ABCI has demonstrated no other source of financing except for a small percentage of revenues received from the sale or lease of transponders should Hughes be successful in its marketing efforts.[26] ABCI's corporate assets, including the cash it will receive from Hughes over the next three years, are less than 2% of the cost to construct and launch the satellites. All progress payments towards launch, including costs of transport to launch site, launch vehicle, NASA

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[20] *Hertmeyer v. FCC*, 95 F.2d 91, 99 (D.C. Cir. 1937).

[21] *George E. Cameron, Jr. Communications*, 91 FCC 2d at 890-891.

[22] *WLOX Broadcasting Company v. FCC*, 260 F.2d 712, 715-716 (D.C. Cir. 1958).

[23] *Phoenix Broadcasting Co.*, 29 R.R. 2d 187 (1973).

[24] *Arthur A. Cirilli*, 3 FCC 2d 893, 897 (1966).

[25] ABCI's principal stockholder made a small loan to ABCI at the outset, presumably for working capital. However, it does not appear that any funds outside those advanced by Hughes have since been received by ABCI.

[26] ABCI is entitled to retain the first $200,000 received from transponder payments in 1984, $325,000 in 1985 and $450,000 in 1986. Satellite Purchase Agreement at 6. If these funds do not provide sufficient working capital, Hughes will advance up to $400,000 to ABCI over these years evidenced by unsecured promissory notes that bear no interest. Satellite Purchase Agreement at 5, 8-9.

fees, launch insurance and satellite preparatory services, are directly made by Hughes.[27] Hughes is also obtaining any necessary loans or capital from banks or other capital ventures to finance these activities. In addition, Hughes has assumed the costs of construction and operation of TT&C facilities and transponder servicing,[28] as well as most of the pre-operational costs such as marketing. Unless ABCI exercises an option in the Transponder Services Agreement, day-to-day operations after launch will also be financed by Hughes. The commenters urge that these factors are indicia of a transfer of control.

15. The commenters further state that Hughes is the entity at risk in this enterprise and will receive most of the profits. The agreements contain no schedule of payments that ABCI is obligated to make and ABCI need not repay Hughes at all if transponders are not successfully marketed. In addition, Hughes is to receive all revenues from transponder customers until it is repaid in full, except for the sum that ABCI may retain for working capital during the years 1984-1986. Thus, according to the opposing parties, ABCI's assertion that it will receive "100% of the profits realized" is inaccurate.

16. In addition to providing the necessary financing, it is alleged that Hughes will control the management of that financing. Hughes may, in its sole discretion and in the absence of a default by ABCI, receive payments directly from transponder customers of any amounts due it for construction, launch and TT&C.[29] Commenters also claim that ABCI's working capital is also determined by Hughes, either by Hughes' control over sales, or, in the case of the working capital loans of up to $400,000, by approval of any use to which ABCI wishes to put these funds.[30]

17. Thus, the opposing parties argue that in the plan submitted by ABCI, Hughes or its affiliates are financing all aspects of operation, from construction to launch, and have complete discretion over the management of funds within each of these areas. In addition, they argue that Hughes has assumed all potential risks and will receive the vast majority of the profits realized. The commenters point to cases in which these circumstances alone have been found sufficient to find a transfer of

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[27] Satellite Purchase Agreement at 3; Launch Service Agreement at 3-4.

[28] Launch Service Agreement at 4; Transponder Service Agreement at 4. Hughes will also reimburse ABCI for legal fees incurred in connection with securing regulatory approval of the Purchase Agreement. Satellite Purchase Agreement at para. 9. GTE Spacenet states that the identification of the party that pays legal fees has been deemed of decisional significance in determining the real party in interest. *Channel 31, Inc.*, 45 RR 2d 420, 422 (1979); *Miami Broadcasting Corp.*, 19 FCC 2d 651, 662 (1969).

[29] Satellite Purchase Agreement at 6-7; Launch Services Agreement at 7.

[30] Satellite Purchase Agreement at 8-9.

control.[31]

18. ABCI replies that it is not unusual for a financier to secure payment by obtaining the right to take payments from customers. It also contends that Hughes and its affiliates have no operational control over ABCI by virtue of its financing because funds are contractually dedicated to specified uses. According to ABCI, financial transactions are often subject to covenants more onerous than those at issue here, and that no transfer has been found in those cases.[32]

2. Day-to-Day Operations

19. According to the opposing parties, the inference that *de facto* control has been transferred is reinforced when the party that dominates a company's finances also assumes pervasive control of the facility's day-to-day operations,[33] including hiring and firing key operating personnel,[34] and operating the TT&C facility.[35]

20. The commenting parties argue that the Hughes-ABCI agreements provide no significant role for ABCI during the construction and launch phase. As evidence of this, they state that Hughes will make all decisions on satellite design, expenditure of revenues, marketing (including price of transponders), launch services and technical and operations support. ABCI's management functions are said to be limited merely to attending design reviews and flight readiness reviews. The commenters further claim that day-to-day operations of the satellite, once launched, will also fall exclusively to Hughes, which, under the Transponder Service Agreement, will provide all forms of stationkeeping, maintenance, and replacement of failed equipment.[36] Additionally, they claim that ABCI will not control the TT&C facilities necessary to establish control of the satellites once they are in orbit.[37] Buyers or lessees of transponders on ABCI's

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[31] *See, e.g., George E. Cameron, Jr. Communications; WLOX Broadcasting Company; Hertmeyer; supra.*

[32] In support of this, ABCI cites *Keymarket Communications of Mississippi, Inc.*, File Nos. BAL-810904-GQ, BALH-810904-GR.

[33] *Fine Arts Broadcasting, Inc.*, 33 R.R. 2d 1169, 1173 (1975); *1400 Corp.*, 12 R.R. 2d at 10-11.

[34] *Southwest Texas Public Broadcasting Council*, 44 R.R. 2d 156, 158 (1981); *Edina Corp.*, 7 R.R. 2d 767, 790-92 (1966).

[35] *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982); *Intermountain Microwave*, 24 R.R. 984 (1963).

[36] Transponder Service Agreement at 5-6. The services to be provided to customers under this contract include all those listed in *Domestic Fixed-Satellite Transponder Sales, supra* note 35, as indicative of control in the satellite context.

[37] GTE Spacenet asserts that this fails to satisfy even the minimal control requirements for domestic satellite operators. In *Domestic Fixed-Satellite Transponder Sales, supra* note 35, the Commission determined that transponder sales would not constitute transfers of control so long as licensees "continue[d] to operate the telemetry, tracking and control stations and retain full authority to comply with all Commission require-

satellites will be required to enter a transponder services agreement with Hughes, whereby all payments for transponder services will be made directly to Hughes.[38] The commenters also state that although ABCI has the right to terminate TT&C and other transponder services, the liability for doing so effectively prohibits its exercise. As a condition to terminating the transponder service agreement, ABCI must have constructed its own ground stations and have hired sufficient personnel to operate them or have hired another entity that meets with Hughes' approval to perform these services. According to commenters, the costs of doing so far exceeds either the working capital to be advanced to ABCI or ABCI's current assets. Additionally, if ABCI terminates Hughes as the sole provider of TT&C and other transponder services, ABCI must pay a termination fee of up to $500,000 to Hughes. The commenters believe that because Hughes is providing all of ABCI's financial and technical support, including ABCI's working capital, ABCI does not have the resources necessary to terminate the TT&C contract. RCA states that it is unlikely that ABCI would exercise its right to reject transponder customers because ABCI would have to pay a 2% commission. In addition, according to the commenters, ABCI's ability to use the loan from Hughes for working capital is conditioned upon Hughes' approval of the intended use. Commenters claim that the amount of uncontrolled working capital is too small to support any significant independent ABCI activities, and there seems to be little that ABCI needs to do with the working capital it will receive over the next three years. Thus, they assert that Hughes has control over all aspects of ABCI's day-to-day operations.

21. ABCI replies that its right under the agreements to reject transponder customers, to approve any customer requested technical modifications to the satellites, and to terminate TT&C and other transponder services, is evidence of its control. Additionally, ABCI states that it has the right to attend design and flight readiness reviews and that it will hire and maintain the necessary secretarial, clerical and professional staffs. Thus, ABCI asserts that it maintains control over the day-to-day operations.

3. Business and Operational Policies

22. The opposing parties argue that another factor considered in determining whether a transfer of control has occurred is who is determining and carrying out the policy decisions of the company.[39] In the satellite context, this is reflected in, among other things, the number of

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ments regarding operation of a satellite in orbit." *Id.* at 1258. According to GTE Spacenet, Hughes, not ABCI, has control of these facilities.

[38] Transponder Service Agreement at 6.

[39] *Intermountain Microwave*, 24 Rad. Reg. 983 (1963); *WHDH, supra* note 19.

satellites sought, the technical specifications and design of each satellite, the number of transponders available, and the basis on which those transponders will be offered.

23. American Satellite asserts that Hughes has influenced ABCI's business plan and policy. American Satellite notes that simultaneous with its request for certification, ABCI filed a request for modification of its authorizations, indicating that there had been a change in its business plan. ABCI now requests authority to sell and lease transponders on a noncommon carrier basis.[40] If this change is not approved by the Commission, Hughes has the right to terminate all agreements except for the Stock Purchase Option.[41] It is noted that the authorized ground spare has been eliminated from ABCI's system as being no longer necessary or desirable,[42] inconsistent with standard practice in the industry to purchase a ground spare as self-insurance against failure.

24. In response, ABCI states that all agreements with Hughes recognize that ABCI, as the Commission's licensee, must assure that its system is constructed and operated in accordance with all applicable statutes.

4. Right to Acquire Licenses

25. The commenters also argue that a final factor considered in determining whether control has been transferred is the right of a party to exercise an option to acquire substantially all of a company. GTE Spacenet notes that in *Channel 31, Inc.*, 45 R.R. 2d 420, 421 (1979), for example, the Commission found that when a third party, who had furnished virtually all funds for an applicant's acquisition and station operation, was given, among other things, an option to purchase all the stock of the applicant's 80% shareholder, questions were raised concerning the applicant's intent to acquire and operate the station. The Commission noted that because the applicant was "a brand new company, very thinly capitalized, with no business experience, [t]he danger of such a company being subject to undue influence would appear to be substantially greater than a large on-going firm." *Id.* at 423. Thus, a substantial question of *de facto* control was raised.

26. The parties note Hughes has paid ABCI $200,000 for the right, exercisable at Hughes' sole option, to purchase the stock of ABCI's majority shareholder, Matt Nilson, three years from the signing of the Stock Option Agreement or one year from the first launch, whichever is

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[40] Certification Request at 26-28.

[41] Satellite Purchase Agreement at 22; Transponder Service Agreement at 13; Launch Service Agreement at 17; Marketing Agreement at 17-18.

[42] Certification Request at 9 n.4.

later.[43] These shares represent 95.1 percent of ABCI stock.[44] Even if the Commission does not approve this purchase, Hughes still has the right to acquire 45 percent of the ABCI stock.[45] Further, ABCI's minority shareholders have indicated their willingness to sell their stock to Hughes.[46]

27. GTE Spacenet urges that ABCI, like the applicant in *Channel 31*, is a new thinly-capitalized company providing its sole financier with an option to purchase substantially all its stock. American Satellite adds that the option is considered by all parties to be an "integral part" of the entire series of agreements.[47] The commenters conclude that Hughes' option, along with its ability to acquire at least 49.9% of ABCI,[48] raises further questions regarding the parties' intent, and is no more than an *ex post* formalization of a transfer of control that has already taken place. Several commenters argue that ABCI's majority stockholder has "acted like a man who has relinquished control and was awaiting a propitious time to sell out his stock holdings."[49]

28. In response, ABCI asserts that the parties have no intention of effecting a transfer of control until the Commission explicitly approves a transfer. According to ABCI, the Commission has in the past relied extensively on the materials in the record when addressing the question of *de facto* transfer of control.[50] ABCI believes that Commission precedent dictates that particular significance must be given to the intentions of the parties as expressed in sworn statements to the Commission. Thus, ABCI asserts that particular significance should be given to affidavits in which ABCI and Hughes' principals testify that they have no intention, desire or purpose to transfer *de jure* or *de facto* control of ABCI to Hughes or any of its subsidiaries. ABCI concludes that these agreements were the only ones it could arrange in the time provided by the Commission. It further asserts that the only restraints of any substance imposed in the agreements are designed for the protection of Hughes' investment, and that investor protection restrictions do not by themselves constitute a transfer of control.[51] It maintains that ABCI's management is free to use its working capital as it sees fit and that ABCI controls its own finances.

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[43] These dates are presently November 11, 1986 and December 31, 1987.

[44] Stock Option Agreement at 3-4.

[45] *Id.* at 4-5.

[46] *Id.* at 14, 21.

[47] Stock Option Agreement at 3.

[48] This represents 45% purchased from Nilson and 4.9% from the minority shareholders.

[49] *E.g.* RCA "Objection to [ABCI] Request for Certification" at 13, citing *Lorain Journal v. FCC*, 351 F.2d 824, 828 (D.C. Cir. 1965).

[50] *News International*, FCC 84-79 (released March 8, 1984).

[51] In support of this, ABCI cites *Data Transmission Co.*, 44 FCC 2d 935 (1974); *Flathead Valley Broadcasters*, 5 R.R. 74 (1965).

ABCI further argues that Hughes has no legally recognizable control over personnel, that the present owner of ABCI has unfettered power to elect and control the Board of Directors and that Hughes may not purchase a majority stock interest without Commission approval. ABCI contends that it has full operational control over TT&C facilities and that it will play the dominant role in the marketing of its satellites.

C. The Unauthorized Transfer of Control of ABCI's Construction Permit also Violates Sections 301 and 304 of the Communications Act

29. The opposing parties contend that because ABCI added no value to its conditional construction permits at the time it entered into its arrangements with Hughes, these arrangements represent an attempt by ABCI to profit on the transfer of a bare license,[52] in violation of Sections 301 and 304 of the Communications Act.[53] GTE Spacenet notes that although the Commission recently eliminated its rule against trafficking in broadcast licenses, it reemphasized the need for its rule against selling construction permits, and stated that this rule must be maintained in order to comply with the mandate of Sections 301 and 304 that provides for the use of radio frequencies, but prohibits their ownership.[54] In defining the scope of its statutory responsibilities in the broadcast area, the Commission stated "Commission inquiry will be restricted as to whether any party has engaged in activity indicating action contrary to the statutory prohibition on license sale, such as attempting to profit on the transfer of a bare license."[55]

30. According to the commenters, the ABCI-Hughes contracts violate Sections 301 and 304 because ABCI has added no value to its authorizations. If allowed to continue, commenters argue, ABCI will have transferred control of its construction permit to Hughes for a profit. According to GTE Spacenet, the entire transaction is an attempt by ABCI to profit from the Commission's desire to allow a new entrant, without large capital resources, an opportunity to become a viable independent participant in the provision of domestic satellite services.

31. American Satellite suggests that ABCI never intended to construct and operate a satellite system. In support, they provide a letter

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[52] At the time the contracts were signed, ABCI's assets consisted of capitalized consulting charges to the principal stockholder of ABCI and a promissory note held by him.

[53] 47 U.S.C. §§ 301 and 304.

[54] *Applications for Voluntary Assignments or Transfers of Control*, 47 Fed. Reg. 55924 (December 14, 1982). "The policy of the Act is clear that no person is to have anything in the nature of property right as a result of the granting of a license." *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 471 (1940).

[55] *Id.* at 55928.

received from ABCI's majority shareholder soon after Commission grant of ABCI's applications. In this letter, Dr. Nilson offered to sell his 95% share of ABCI stock to American Satellite, and stated that "[i]t is not necessary for me to have a continued role with ABCI or your company. . . ."[56] According to American Satellite, this can be realistically construed only as an attempt to sell the construction permit. In response, Dr. Nilson claims to have significantly changed his plans and intentions regarding the disposition of ABCI. Thus, Dr. Nilson states that he will remain the dominant force in corporate affairs at least until explicit Commission approval of the transfer has been given.

D. The Proposed Transaction Violates the Commission's Processing Procedures and Unfairly Disadvantages Other Applicants

32. Commenters argue that approval of the ABCI-Hughes arrangement would be in derogation of the Commission's processing procedures for the current group of applicants and would conflict with the Commission's domestic satellite policy objectives. Allowing Hughes to obtain two additional orbital assignments before its own applications for these assignments are before the Commission would, according to the commenters, also work a competitive disadvantage to those domestic satellite applicants filing under the established procedures.

33. Commenters point out that the ABCI *Authorization Order* was issued pursuant to the procedures specified in our *1982 Processing Order*.[57] Specifically, applications, such as ABCI's, filed on or before May 18, 1982, were to be processed as a group. Applications filed after that date, such as Hughes' for 12/14 GHz satellites, were to be processed after those then on file. This procedure allowed the Commission to act upon the applications in a timely manner and to assign orbital locations efficiently. If ABCI failed to meet the conditions of its authorizations its "orbital locations will be reassigned to a qualified applicant in the next processing group who can then proceed promptly with its domestic satellite program."[58]

34. In addition, commenters state that Hughes also received a satellite authorization pursuant to the procedure adopted by the *1982 Processing Order* for its 4/6 GHz system,[59] but did not file its 12/14 GHz proposal until well into 1983. The Hughes 12/14 GHz applications are therefore to

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[56] Letter from Dr. Matt C. Nilson to Emmanuel Fthenakis, Chairman of the Board, American Satellite Corporation of June 28, 1983.

[57] *Domestic Fixed-Satellite Service*, 90 FCC 2d 1 (1982), *recons. den. sub nom. GTE Satellite Corporation*, 93 FCC 2d 832, 833 (1983). It is well settled that the choice of agency procedure is committed to the agency's discretion. *See FCC v. Pottsville Broadcasting Company*, 309 U.S. 134 (1940).

[58] *Reduced Spacing Order* at paragraph 66.

[59] *Hughes Communications, Inc.*, 94 FCC 2d 271 (1983).

be processed in accordance with the *1983 Processing Order*.[60] The commenters contend that because Hughes is the real party in interest here, and the proposed ABCI system is essentially the same as the 12/14 GHz system Hughes currently has on file, approval of the ABCI-Hughes transaction would allow Hughes to advance ahead of other applicants in the 1983 processing group. Specifically, opposing parties contend that Hughes would be able to proceed with the development and marketing of its pending 12/14 GHz system well before its application has been reviewed together with those of the other 21 applicants. According to the commenters, allowing Hughes to obtain two additional orbital assignments in this manner would be in derogation of Commission procedures and work a competitive disadvantage to other domestic satellite applicants filing pursuant to Commission procedure. They argue that this is especially true as it is not all clear that there will be a sufficient number of orbital locations to satisfy the requests of the applicants in the next group.[61]

E. The Hughes-ABCI Arrangements Contradict ABCI's Representations to the Commission and Undercut the Basis for ABCI's Authorization

35. Finally, the parties contend the arrangement structured in the ABCI-Hughes agreements contradicts the representations made by ABCI that convinced the Commission to allow ABCI an opportunity to arrange financing with a construction permit in hand. They state ABCI has not established itself as a new domestic satellite operator nor has ABCI fulfilled the representations it made to this Commission. The Commission's departure from the *Domsat II* requirement for fully qualified grantees relied upon ABCI's repeated representations that it could readily obtain financing from banking and financial institutions once a construction permit was in hand, that grant of its application would "stimulate competition among satellite carriers" through a "new, dynamic communications company," and that grant would prevent domination of the domestic satellite carrier industry by a few entrenched companies.[62] Without such representations and the anticipated benefits of a potential new entrant, they state a more conventional approach requiring evidentiary proof of qualifications would have been followed. They allege ABCI's proposed arrangement indicates that it will not operate as an independent

[60] *Filing of Applications for New Space Stations in the Domestic Fixed-Satellite Service*, 54 R.R. 2d 565 (1983).

[61] Twenty-one applicants filed applications in response to our November 7, 1983, filing deadline. *See* Public Notice, Report No. DS-265, March 12, 1984. The number of pending requests for orbital locations may exceed the number of locations currently available for assignment. *See Assignment Order*, 94 FCC 2d 129 (1983).

[62] Application at 23.

new entrant; thus, none of the public interest findings in ABCI's *Authorization Order* will be achieved, and the public interest finding is no longer valid. In light of the events that have occurred since the grant of ABCI's application, including its attempt to sell its orbit positions to American Satellite and its continued revision of the Hughes-ABCI agreements, they question whether ABCI ever intended to fulfill its representations.

IV. Discussion

A. Compliance with Financial Conditions

36. ABCI has not demonstrated that it is independently financially qualified to construct and operate its proposed system, nor are the financial arrangements with Hughes the firm commitments envisioned by the Commission when it issued conditioned authorizations. ABCI's construction permits required it "to arrange [its] financing and to execute spacecraft construction and launch services contracts by December 31, 1983," to "submit to us the schedule of payments to which [it is] contractually committed," and to "submit written evidence from [its] financial sources indicating that sufficient funds are irrevocably committed to satisfy the payment schedule."[63] ABCI was afforded thirty days either to seek reconsideration of its conditioned authorizations[64] or to decline the authorizations as conditioned.[65] It did neither. Rather, it accepted the authorizations by letter dated September 13, 1983. Thus, if ABCI has not demonstrated its financial qualifications as specified by these conditions, its authorizations are null and void.[66]

37. ABCI has not satisfied these conditions. There is no schedule of payments to which ABCI is contractually committed. Rather, repayment

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[63] *Reduced Spacing*, *supra* note 2, at para. 65. *See* Letter to United dated October 27, 1983, from the Chief, Common Carrier Bureau. In that letter the Bureau emphasized that although the term "irrevocable" was not intended to be construed in so literal a fashion that the condition would be impossible to satisfy, it was intended to be more stringent than simply providing "reasonable assurances" of financial qualifications.

[64] *See* Section 1.106 of the Commission's rules. 47 C.F.R. § 1.106.

[65] *Authorization Order*, *supra* note 1, at 4.

[66] ABCI accepted the financial conditions of its permits and authorizations in lieu of our conducting an evidentiary hearing on a financial qualification issue. *Reduced Spacing* at para. 62. *Reduced Spacing* made clear that failure to comply with the conditions would result in the automatic cancellation of the authorization. Thus, any right to a hearing on the financial qualifications issue has effectively been waived. *Reduced Spacing* also clearly set forth the requirements that ABCI must fulfill to establish its qualifications to construct and operate a domestic satellite system. *Id.* When an applicant patently fails to comply with a Commission rule or condition, as is the case here, its authorization may be denied with no right to a hearing. *See United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956); *P & R Temmer v. FCC*, No. 83-1580 (D.C. Cir., September 14, 1984), slip op. at 16-17.

to Hughes is to be made only from revenues received from the sale or lease of transponders. ABCI incurs no liability and need not repay Hughes if transponders are not successfully marketed.[67]

38. Moreover, Hughes' financial commitment is not an "irrevocable" commitment as required in ABCI's conditional authorization.[68] Hughes may at any time prior to the delivery of the satellites pay a penalty and terminate the agreements without cause. In addition, Hughes' commitment rests entirely on a contingency which may not be met because the whole arrangement can be terminated by Hughes in its sole discretion if transponder sales do not meet stated targets, and there are no guarantees that transponder sales will in fact meet those targets. Moreover, ABCI has no control over this contingency because under the marketing contract, Hughes, not ABCI, has initial authority to market the transponders. Nor do the contracts provide for penalties if Hughes does not meet the specified marketing goals. Furthermore, even if ABCI, as a result of Hughes' failure, is in a position to exercise its rights under contract to market the transponders, there is no evidence that ABCI, without an established marketing department, will succeed if Hughes has failed.

39. The Commission has consistently held that when a financial commitment is dependent on a contingency, the burden is on the applicant to establish its ability to satisfy that contingency.[69] ABCI has not done so. There is no irrevocable commitment that the satellites being constructed by Hughes will be delivered to ABCI. This alone demonstrates that ABCI has not fulfilled the conditions of its authorizations and therefore its authorizations are null and void.

B,C,D,E: Violations of Sections 310, 301 and 304: Violation of Processing Procedures and Unfairness to Other Applicants; Misrepresentation

40. Although the parties have made detailed arguments on each of these points, we need not decide them. The determination of whether a transfer of control has occurred is not based on any precise formula. Resolution involves analysis of the totality of the circumstances and the

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[67] Satellite Purchase Agreement at 5-7.

[68] Moreover, the proposed transaction would not even appear to meet the Commission's less stringent "reasonable assurance" standard. Under this standard, contingent financial arrangements have been found unacceptable. *See, e.g., West Jersey Broadcasting Co.*, 89 FCC 2d 478 (1978), where a bank loan commitment was conditioned on a continuing personal guarantee of a principal of the applicant and the bank's appraisal of the principal's property which would be collateralized by the bank. It was held that "[the applicant's] failure to establish what the collateral might be and its ability to meet such requirements is fatal, and it requires a conclusion that [the applicant] has failed to establish its financial qualifications." *Id.* at 527.

[69] *See, e.g., West Jersey, id.*

often cogent arguments presented by the opposing sides. Because our decision to declare ABCI's authorizations null and void can rest solely on our finding that ABCI failed to satisfy the conditions of its authorizations, we need not reach a decision on whether a transfer of control has occurred here. Similarly, deciding whether approval of the Hughes/ABCI arrangements would unfairly disadvantage applicants in the current processing group or whether ABCI has engaged in a material misrepresentation to this Commission (and, if so, what the appropriate response should be) would serve no purpose in this case. The Commission tried an experimental approach in permitting a potential fixed-satellite licensee to construct, launch and operate in-orbit satellite systems. The approach has not proven successful in this case.

41. We are sympathetic to the problems faced by under-and non-capitalized firms that wish to provide space services. Entrepreneurial firms are likely to bring new technologies, new marketing approaches, and new services which are valued by customers. Although ABCI has not been able to meet our necessarily difficult standards and demonstrate an ability to construct, launch and operate a 12/14 GHz satellite system, there are a host of options available to a firm that wishes to participate in the domestic satellite industry. For example, a firm may acquire, either by lease or sale, transponders from a currently licensed system operator and offer its services in that manner. If sufficiently successful in this regard, or with respect to its other business endeavors, a potential licensee may eventually establish sufficient assets to form the basis for financing a new system. In particular, we expect the 18/30 GHz band to offer substantial opportunities for new entry in the future.

V. Conclusion

42. We have reviewed the ABCI submission, together with the amended ABCI-Hughes contracts, and conclude that ABCI has not satisfied the financial condition of its *Authorization Order*. Thus, by its terms as accepted by ABCI, the authorizations for the ABCI domestic satellite system are now null and void.

43. Accordingly, the authorizations granted to Advanced Business Systems, Inc. by our *Order and Authorization* adopted April 27, 1983, 94 FCC 2d 1 (1983) ARE DECLARED NULL AND VOID, and IT IS ORDERED that the other requests captioned above ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

National Environmental Policy Act of 1969
Radiation
Radiation, Electromagnetic, Hazardous Level
Radiation, Exposure
Radiation, Radio Frequency

Report and Order adopted amending §1.1305 to add to the list of "major actions" a category of operations and facilities applicable to health and safety guidelines for human exposure to radiofrequency electromagnetic radiation. Applications for such facilities will be treated as "major actions" as provided in the FCC Rules implementing the National Environmental Policy Act of 1969.
—*Amendment of Part 1*
Gen. Docket No. 79-144

FCC 85-90

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Responsibility of the Federal Communications Commission to consider biological effects of radiofrequency radiation when authorizing the use of radiofrequency devices.	Gen. Docket No. 79-144
Potential effects of a reduction in the allowable level of radiofrequency radiation on FCC authorized communications services and equipment.	

REPORT AND ORDER

Adopted: February 26, 1985; Released: March 14, 1985

BY THE COMMISSION:

I. Summary

1. The Commission is amending Part 1 of its rules implementing the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321 *et seq*. (1976). The amendment provides for environmental analysis of major Commission actions that may result in non-compliance with applicable

health and safety guidelines for radiofrequency (RF) radiation. Our processing guideline for determining the significance of human exposure to RF radiation will be the "Radio Frequency Protection Guides" adopted in 1982 by the American National Standards Institute (ANSI). At this time, the rule amendment will only apply to major actions taken by the Commission with respect to the following facilities authorized by the FCC Rules and Regulations: (1) broadcast facilities authorized under Part 73; (2) broadcast facilities authorized under Part 74 (Subparts A and G only); (3) satellite-earth stations authorized under Part 25; and (4) experimental facilities authorized under Part 5. An accompanying *Further Notice of Proposed Rule Making*, also being issued today, proposes to categorically exclude other FCC-regulated facilities and operations from the provisions of this rule, except for shipboard satellite-earth terminals.

II. Background

2. On June 7, 1979, the Federal Communications Commission (FCC) issued a *Notice of Inquiry* (NOI) concerning the responsibility of the FCC to consider biological effects of radiofrequency (RF) radiation when licensing facilities and authorizing equipment that utilize RF energy.[1] The NOI was designed to: (1) assist the FCC in determining whether it is appropriate for the Commission to take any action under health and safety standards for exposure to RF radiation, and (2) provide documentation so that the FCC can adequately participate in rulemaking proceedings of other agencies to assure that any standards adopted adequately take into account the impact on the licensees and equipment regulated by the FCC.

3. As a result of the comments received in response to the FCC's NOI and our assessment of the Commission's statutory responsibilities under the National Environmental Policy Act of 1969 (NEPA)[2], the Commission issued a *Notice of Proposed Rule Making* (NPRM), on February 18, 1982, proposing to amend Section 1.1305 of the Commission's Rules and Regulations implementing NEPA[3], by expanding the list of "major actions" subject to the Commission's environmental processing standards, 47 C.F.R. §1.1305. It proposed that applications for equipment authorizations would be treated as "major actions" triggering environmental assessment when the equipment in question did not comply with RF radiation emission standards. It was also proposed that applications for construction permits or licenses to transmit would be treated as "major

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[1] *Notice of Inquiry*, General Docket No. 79-144, 44 Fed. Reg. 37008 (1979), 72 F.C.C. 2d 482 (1979).

[2] 42 U.S.C. §§4321 *et seq*. (1976).

[3] *Notice of Proposed Rule Making*, General Docket No. 79-144, 47 Fed. Reg. 8214 (1982), 89 F.C.C. 2d 214 (1982). *See also* 47 Fed. Reg. 10871 (1982) and 47 Fed. Reg. 27384 (1982) (*Correction* and *Order Extending Time for Filing Comments and Reply Comments*).

actions" triggering environmental assessment when the proposed operation would result in the exposure of workers or the general public to levels of RF radiation in excess of safe levels established by federal agencies which have jurisdiction to set such standards.

III. Discussion

A. General

4. A total of twenty-three filings of comments and reply comments were received at the FCC in response to the Commission's NPRM in Docket 79-144 and all comments have been considered. The respondents included individuals, broadcast groups, major corporations, trade associations, a labor union, local government officials, and the U.S. Environmental Protection Agency. A list of the parties filing comments and reply comments in this proceeding can be found in Appendix 2.

5. With a few exceptions, respondents to the NPRM generally supported the thrust of the Commission's proposal. The general tone of the comments indicated a desire by many respondents that the Commission clearly establish a policy regarding RF radiation hazards and clarify Commission and licensee responsibilities in this area of growing public concern. Several of the respondents also suggested the Commission take actions that, we believe, go beyond the scope of this proceeding. Although various broadcast groups, such as the National Association of Broadcasters (NAB), the TV Broadcasters All Industry Committee (TVBAC), the Association for Broadcast Engineering Standards, Inc. (ABES), and the National Association of Public Television Stations basically supported the proposed rule, they and others urged the Commission to issue a policy statement dealing with federal preemption of local and state standards for RF radiation. For example, TVBAC urged the Commission to "issue a Policy Statement which clearly and forcefully asserts its authority and intention to preempt unwarranted state or local RF radiation standards that arbitrarily limit or preclude communications services to the public."

6. Two respondents felt that the Commission should not adopt the proposed rule amendment at this time. The Utilities Telecommunications Council (UTC) recommended "that the Commission postpone adoption of its proposal until the EPA or another responsible federal agency establishes a legally enforceable exposure standard." UTC felt that it would be premature for the FCC to adopt its proposed rule in view of the fact that various federal agencies "are only in the preliminary stages of standard development and in light of the disparate views and positions of scientists the world over concerning what constitutes a radiation 'hazard'. . . ."

7. Similarly, RCA Corporation, while endorsing the concept of national standards and while recognizing the proposed Commission regulation as

"meritorious," nonetheless felt that the Commission should "defer adoption of the regulations implementing NEPA until such time as the Federal agencies issue suitable radiation standards." RCA feared that if the Commission adopted regulations before the issuance of federal standards, "such regulations may be ineffective, inappropriate, or detrimental to those persons regulated thereunder." The UTC and RCA comments, however, were outweighed by those comments supportive of our taking action at this time.

8. It is our judgement that the Commission is required to make a threshold determination as to whether the facilities it approves are "major Federal actions significantly affecting the quality of the human environment," thus triggering environmental review, regardless of whether federal guidelines or standards currently exist for general public exposure to RF radiation.[4] The Commission cannot avoid its independent legal obligation under NEPA to make its own determination as to the environmental impact of its "major actions." Rather, the Commission must comply with its procedural duties under NEPA "to the fullest extent, unless there is a clear conflict of statutory authority."[5] Just as "[c]onsideration of administrative difficulty, delay or economic cost will not suffice to strip [NEPA] of its fundamental importance," *id.*, so too, the mere absence of a federal standard or individual agency expertise does not absolve the Commission of its NEPA responsibilities. Thus, an agency "cannot refuse to give serious consideration to environmental factors merely because it thinks that another agency should assume the

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[4] *See* 42 U.S.C. §4322(2)(c) (1976). *See also* NOI, *supra* note 1, at para. 12-13; NPRM, *supra* note 3, at para. 11; *State of Alaska v. Andrus*, 591 F.2d 537, 540-41 (1979), *quoting Natural Resources Defense Council, Inc. V. Morton*, 388 F. Supp. 829, 834 (D.D.C. 1974), *aff'd mem.*, 527 F.2d 1386 (D.C.Cir.), *cert. denied*, 427 U.S. 913 (1976). ("The term 'actions' refers not only to actions taken by federal agencies; but also to decisions made by the agencies such as the decision to grant a license, which allows another party to take an action affecting the environment.") Under NEPA, each federal agency is required to prepare a detailed environmental impact statement for any "major" action it takes "significantly affecting the quality of the human environment." 42 U.S.C. §4332(2) (c). Such a statement need not be prepared whenever the agency can satisfy itself that its proposed action will not significantly affect the environment. The NEPA guidelines issued by the Council on Environmental Quality (CEQ) also permit agencies to exclude categorically from NEPA processing those actions "which do not individually or cumulatively have a significant effect on the human environment . . ." 40 C.F.R. §1508.4 (1980). Even when a proposed action does have a significant effect on the human environment, that action may still be taken if the benefits of the action outweigh the environmental consequences. NEPA requires only that the benefits be weighed against the costs in any environmental assessment or environmental impact statement.

[5] *See Calvert Cliffs' Coordinating Committee, Inc. v. United States A.E. Com'n.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

responsibility for promoting the policies of NEPA."[6]

B. Guidelines for RF Radiation Exposure

9. A major topic of discussion among the respondents was the matter of which RF standard or guideline the Commission should use as its criterion for identifying a "major action" for processing under the NEPA rules. The Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor has jurisdiction to establish RF exposure standards for workers. The U.S. Environmental Protection Agency (EPA) has the authority to recommend safe levels for exposure of the general public to RF radiation. Our NPRM noted that OSHA had previously issued a radiation protection guide for workers[7], and that, until a federal standard for the general public was developed, we proposed to use the OSHA workers' exposure guidelines for determining what constituted a "major action" with respect to general public exposure to RF radiation. In May 1982, OSHA proposed to revoke its advisory standards, including the advisory standard for exposure of workers to non-ionizing radiation.[8] However, subsequently, OSHA reconsidered and decided to retain its advisory standard for RF radiation.[9]

10. In light of OSHA's proposed revocation, some respondents felt that the Commission should reconsider its proposal to use the OSHA guidelines. To quote the American Radio Relay League (ARRL), "OSHA's decision to now propose revocation of its advisory standard on worker exposure to nonionizing radiation would effectively knock the underpinnings out of the FCC proposed Section 1.1305(d)." Other parties, including most of the broadcast groups, did not think that OSHA's action should affect the Commission's proposal. For example, Satellite Business Systems expressed the opinion that "OSHA proposed to withdraw its standard for procedural reasons related to its powers under its enabling statute. It did not indicate any disapproval of the standard . . ."

11. GTE Service Corporation, Aeronautical Radio, Inc. (ARINC), ARRL, Thomas Agoston, Donald E. Clark, and Motorola, Inc. advanced an

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[6] *See Natural Resources Defense Council, Inc.* v. *S.E.C.*, 432 F. Supp. 1190, 1207-1208 (D.C.D.C. 1977), *rev'd on other grounds*, 606 F.2d 1031 (D.C. Cir. 1979), *citing* S. Rpt. No. 91-296, 91st Cong., 1st Sess. 18-19 (1969).

[7] *See* 29 C.F.R. §1910.97(a)(2). The OSHA guide recommended that exposure not exceed a power density of 10 milliwatts per square centimeter (mW/cm^2) or the mean-squared electric field strength and mean-squared magnetic field strength equivalents of 40,000 volts squared per meter squared or 0.25 amperes squared per meter squared, respectively, averaged over any six-minute period. These OSHA guidelines were not developed by OSHA itself, but, rather, represented a direct adoption by OSHA of a preexisting standard developed by a non-government, independent organization, the American National Standards Institute (ANSI). (*See* para. 24, *Infra*).

[8] *See* 47 Fed. Reg. 23477 (1982).

[9] *See* 49 Fed. Reg. 5318 (1984).

alternative approach. They proposed that, in place of the OSHA guidelines, the Commission should use, as an interim or provisional standard, the voluntary RF radiation protection guides issued in 1982 by the American National Standards Institute (ANSI).[10] GTE maintained that:

> Although the Commission has expressed the opinion that it does not have the expertise to *create* health standards for RF and microwave radiation, . . . the Commission does have the expertise to *recognize* a technically sound radiation standard, and, in the absence of other federal agency standards, adopt it as an interim standard. (emphasis in the original)

12. To support its position, GTE pointed to 1982 guidance from the Office of Management and Budget encouraging reliance of federal agencies on voluntary standards.[11] Other parties stated that they either endorsed or did not oppose Commission reliance on the ANSI radiation protection standard as a standard for purposes of application processing under NEPA.

13. Although several of the broadcast groups would have preferred that the Commission use the OSHA radiation protection guide, they indicated that use of the ANSI standard would be acceptable. For example, to quote TVBAC, "[w]hile the ANSI standards are more stringent than the 10 mW/cm^2 standard at certain frequencies, they are not so strigent as to impair broadcasting services." (TVBAC comments, at 11). Similarly, NAB expressed the view that "[t]he adoption of [the ANSI] standard would pose a hardship in only a few instances and would be infinitely better than the patchwork of unrealistic and varying local standards that is being developed in the absence of federal action." (NAB comments, at 6). NAB maintained that even though there is "no evidence" that the OSHA guideline has failed to protect the public health adequately, "NAB recognizes that good arguments have been made within the scientific community for a fequency-sensitive standard such as the new one proposed by ANSI." (Id.)

14. In its Comments, GTE Service Corporation further noted that the Commission has previously "made reference in its rules to nationally

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[10] ANSI C95.1-1982 (revision of ANSI C95.1-1974). Copyright 1982 by the Institute of Electrical and Electronics Engineers, Inc., New York, N.Y. 10017. The ANSI protection guides recommend various time-averaged values for safe exposure in five different frequency bands. Recommended equivalent plane-wave, free-space power density levels are 100 milliwatts per square centimeter (mW/cm^2) for 300 kHz to 3 MHz, 1 mW/cm^2 for 30-300 MHz, and 5 mW/cm^2 for 1500 MHz to 100 GHz, with transitional levels in the intervening frequency bands. Copies of the ANSI recommendations are available from the American National Standards Institute, 1430 Broadway, New York, N.Y. 10018 or from: Standard Sales - IEEE, 445 Hoes Lane, Piscataway, N.J. 08854.

[11] *See* Office of Management and Budget, "Final Issuance of OMB Circular No. A-119, 'Federal Participation in the Development and Use of Voluntary Standards' ", 47 Fed. Reg. 49496 (1982).

recognized standards"[12] as well as "recognized the work done by ANSI in other areas."[13] Citing "strong support" in the record of this proceeding for Commission use of the ANSI standard, GTE, therefore, recommended that "[s]ince the current ANSI standard represents the consensus of the experts active in the field, its recognition by the Commission as an interim federal standard would be in keeping with OMB's guidance and would help to stem the tide of potentially conflicting local standards."

15. Echoing GTE, Motorola, Inc. urged the Commission to "adopt without modification the ANSI standard for human exposure to radiofrequency radiation; it is technically sound and widely supported." Motorola went on to note that "in the absence of Government promulgated standards, it is entirely appropriate for the FCC to employ those formulated by voluntary standards-developing bodies." The ANSI standard, maintained Motorola, "represents the best determination of many knowledgeable parties, and could effectively be used on an interim basis unless or until an appropriate Government agency promulgates new or different standards."

16. In addition to comments filed during the official comment period following our NPRM in this proceeding, the ARRL filed a "Petition for Expedited Special Relief and Declaratory Ruling" on March 20, 1984. In its petition ARRL requested that the Commission issue "at the earliest possible moment" an interim policy statement and status report on the appropriateness of use of the ANSI standard as an RF protection guideline. ARRL restated its recommendation filed previously that the Commission adopt the ANSI C95.1-1982 standard as an interim radiation protection guideline. Similar sentiments were expressed in a letter, dated August 27, 1984, from the Electromagnetic Energy Policy Alliance (EEPA) to Mark S. Fowler, Chairman of the FCC.

17. Significant misgivings about Commission use of the OSHA guidelines were expressed from another perspective in comments of the U.S. Environmental Protection Agency (EPA). EPA noted that, "[i]n general, we are in agreement with the subject document as written, but we have reservations about the use of the OSHA occupational standard as an interim standard for exposure of the general public until EPA issues guidelines for exposure of the public." EPA observed that factors related to environmental heat stress and the health of exposed individuals

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[12] *See* GTE Comments, at 5, citing Commission Rules, §73.317(g)(1)(ii), incorporating the National Electrical Code.

[13] *Id.*, citing *Order Terminating Proceeding* in Docket No. 21371, released August 6, 1982 (FCC 82-359) (Commission terminated docket proceeding to develop standards for RF test sites partially because ANSI was creating such a standard.) *See also* the NOI in this proceeding, *supra* note 1, at para. 9, citing previous Commission reliance on an earlier OSHA/ANSI RF radiation standard.

suggested that the OSHA standard "may not provide adequate protection for certain segments of the public."

18. EPA advised that a plan for the development of "Federal Radiation Protection Guidance for Public Exposure to Radiofrequency Radiation" has been prepared by EPA's Office of Radiation Programs. This plan called for release of the proposed guidance for public comment by the fall of 1983 and publication of the final guidance approximately one year later. EPA suggested that "[u]ntil such time, the FCC should consider using a more conservative approach to evaluating public exposure than that provided in the OSHA standard." In December 1982, EPA issued an "Advance Notice of Proposed Recommendations," indicating its intention to develop "Federal Guidance" for exposure of the general public to RF radiation.[14] However, the EPA recommendations have not been officially released as of this date, and we cannot predict what action EPA will ultimately take in this area.

19. Reservations about FCC adoption of the OSHA guidelines were also expressed in comments submitted by Oregon officials Donald E. Clark and Dr. Charles P. Schade. For example, Schade maintained that occupational exposure standards "do not protect persons in the population who might be especially sensitive to radiofrequency energy." He mentioned small children and persons with chronic illnesses as examples of individuals who might be adversely affected by the Commission's use of an occupational standard as a standard for exposure of the general public.

20. There were two reasons for our initial proposal to rely on the OSHA occupational standard as an interim guideline for exposure of the general public. First, no standard had been established by the Federal Government for exposure of the general public to RF radiation. Second, as indicated in the NPRM, we believed that some guideline is necessary to facilitate the Commission's environmental review process until such time as EPA or another responsible federal agency recommends or adopts guidelines or standards for exposure of the general public to non-ionizing RF radiation.[15]

21. Subsequent developments, however, as noted, necessitated a reconsideration of our initial proposal. In 1982, OSHA proposed to revoke the occupational RF radiation protection guide. Although OSHA reconsidered its original proposal and ultimately decided to retain the RF advisory standard, that reconsideration was for procedural rather than scientific reasons. Moreover, some of the respondents as noted, pointed out serious problems with Commission reliance on the OSHA occupational standard to evaluate public exposure to RF radiation. Finally, as noted, EPA has not yet developed "Federal Guidance" for public exposure to RF radiation.

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[14] *See* 47 Fed. Reg. 57338 (1982).

[15] *See* NPRM, note 3, *supra*.

22. Absent a federal standard for exposure of the general population, and in the face of the Commission's acknowledged statutory obligation under NEPA, two questions, therefore, remain. Under these circumstances can the Commission rely on existing exposure guidelines in view of the lack of federal standards? If it can, upon which guidelines should it reply?

23. First, we believe that the Commission can rely on existing exposure guidelines as long as they are technically sound and scientifically supportable. This reliance will enable us to fulfill our explicit NEPA statutory obligation to assess the environmental impact of our "major actions" with respect to potential RF and microwave radiation hazards.

24. Second, regarding the exposure guidelines on which the Commission will rely, in light of recent developments, and as a result of comments received in this proceeding, we are modifying our original proposal for evaluating RF radiation exposure (*see* Appendix 1). We are incorporating by reference into our NEPA rules the guidelines recommended by the American National Standards Institute (ANSI) entitled "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz" (ANSI C95.1-1982).[16] We believe that, for the present, our use of the ANSI guidelines will best implement our statutory obligations under NEPA.

25. We have selected the non-government ANSI guidelines to evaluate general population and worker exposure to RF radiation because they are scientifically based and widely accepted guidelines that are applicable to the general population as well as to workers. These ANSI guidelines were both mentioned in the NPRM and, as discussed in more detail below, advocated by a number of the respondents in lieu of the OSHA occupational exposure guidelines. Although we have neither the expertise nor the jurisdiction to *develop* our own radiation exposure guidelines, we believe, as supported by comments received in this proceeding, that the Commission does have the expertise and authority to *recognize* technically sound standards promulgated by reputable and competent organizations such as ANSI. The OSHA radiation protection guide upon which we had originally proposed to rely was based directly on the prior ANSI standard of 10 milliwatts per square centimeter (mW/cm^2) originally issued in 1966.[17] ANSI's revision of that standard, in 1982, reflected recently acquired knowledge of the biological effects of RF radiation. We, therefore, believe that the 1982 ANSI standard is more appropriate than the OSHA advisory guideline. Furthermore, the OSHA guidelines were written as an exposure guide for workers, whereas the 1982 ANSI recommendations "are intended to apply to non-occupational as well as to

[16] *See* note 10, *supra*.

[17] *See* 29 C.F.R. §1910.99, "Source of standards," identifying the basis for OSHA's RF radiation guide.

occupational exposures." The revised ANSI guidelines also apply to a broader frequency range than the OSHA guidelines and, unlike the OSHA guidelines, contain recommendations for exposure in the standard (AM) broadcast band.

26. We would prefer to defer in this area to the expert federal health and safety agencies. We believe, however, that NEPA requires us to consider the environmental impact of the operations and facilities we license or approve, regardless of whether federal standards currently exist or we have the requisite expertise to set such standards. For our purposes we require technically sound and widely recognized guidelines which are scientifically supportable. Therefore, we have chosen with this rule amendment to rely upon the widely recognized 1982 ANSI RF radiation protection guidelines as an environmental processing trigger.

27. The Commission will be relying upon the ANSI guidelines to facilitate our environmental review obligations under NEPA.[18] Under our NEPA rules, environmental concerns, such as RF radiation exposure, are weighed and balanced in making a public interest determination. If a proposed operation or facility will result in human exposure in excess of the ANSI limits, environmental analysis will be required. However, the application can be amended to reduce or eliminate the possibility for excessive exposure. If an environmental impact statement is necessary, with regard to RF radiation, the ANSI guidelines will be used in determining whether the environmental impact or risks outweigh the benefits of the proposal.

28. We are aware of new or proposed recommendations for exposure to RF radiation promulgated by other organizations subsequent to the issuance of our NPRM. For example, new exposure guidelines, more restrictive than the ANSI standard for exposure of the general public, were released in April, 1984, by the International Radiation Protection Association (IRPA).[19] The National Council on Radiation Protection and Measurements (NCRP) is currently developing RF exposure guidelines for workers and the public. In addition, the American Conference of Governmental Industrial Hygienists (ACGIH) and the National Institute for Occupational Safety and Health (NIOSH) have recommended or are developing recommendations for occupational exposure to RF radiation, and, as discussed previously, EPA has been in the process of developing federal guidelines for RF exposure. While IRPA has now issued guidelines and other groups may do so in the future, we believe that the Commission should act on the basis of the record before us at the present

[18] *See* note 4, *supra*.

[19] "Interim Guidelines on Limits of Exposure to Radiofrequency Electromagnetic Fields in the Frequency Range from 100 kHz to 300 GHz," published in *Health Physics*, Vol. 46, No. 4, pp. 975-984 (April 1984).

time rather than postpone action indefinitely as we seek the ultimate standard. It is possible that we may revisit this issue and recommend use of a different standard in the future. However, for the present, the record before us supports use of the 1982 ANSI standard.

C. License Renewals and Modifications

29. We have determined that we are legally obligated under NEPA to include license renewal and facility modification applications within the scope of our environmental processing guidelines. To clarify as well as qualify the applicability of our amended NEPA processing rules to such applications, we would note the following points. First, both the NEPA case law[20] and regulations of the Council on Environmental Quality implementing the statute[21] make clear that the statutory term "major Federal action" includes both new and continuing federal activities such as initial licensing as well as license renewals and modifications.

30. Second, NEPA encompasses continuing as well as initial federal actions so as to make environmental quality and environmental protection ongoing concerns of every federal agency.[22] Third, with its emphasis on ongoing environmental quality and protection under ever changing environmental circumstances, the NEPA statute does not provide for grandfathering of any existing facility or project.[23] The procedural

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[20] *See, e.g., Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983) ("The federal action that affects the environment in this case is permitting *renewed* operation of [the Three Mile Island - 1 nuclear reactor].") (emphasis added); *People vs. Nuclear Energy vs. Nuclear Regulatory Commission*, 678 F.2d 222, 231 (D.C. Cir. 1982) (The " 'major federal action' in the case of TMI-1 is . . . the Commission's continued exercise of supervisory responsibility over its operation and maintenance."). *See also Far East Broadcasting Co., Inc.*, 65 F.C.C. 2d 496 (1977) (FCC denied petition opposing license renewal on basis of alleged radiation effects.)

[21] *See, e.g.*, 40 C.F.R. §1508.18 (1978) defining "major Federal actions" to "include new and continuing activities." *See also Lee v. Resor*, 348 F. Supp. 389, 395 (M.D. Fla. 1972) (citing CEQ guidelines applying NEPA requirements to continuing programs or activities.)

[22] *See, e.g., Lathan v. Volpe*, 455 F.2d 1111, 1116, 1121 (9th Cir. 1971) (NEPA does not apply retroactively, but is is applicable to continuing or ongoing federal projects, including those commenced prior to January 1, 1970, the effective date of the NEPA statute); 40 C.F.R. §1502.9(c)(1)(ii), the CEQ regulation requiring agencies to modify environmental analyses in order to take into account "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impact;" *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1088 (1973); *Monarch Chemical Works, Inc. v. Exxon*, 452 F. Supp. 493 (D.C. Neb. 1978), *aff'd* 604 F.2d 1083 (8th Cir. 1979); *Bennett v. Taylor*, 505 F. Supp. 800 (D.C. La. 1980).

[23] Although both the NEPA statute and the accompanying legislative history are silent on grandfathering, the legislative intent is explicit in its enunciation of concern for ongoing environmental quality, a value which will be endangered by, and inconsistent with, grandfathering of facilities despite possibly changing environmental circumstances and standards. Consider for example, the situation of an FM radio facility first licensed under

requirements of the statute, however, are not applicable to, or triggered by, existing facilities but only apply to, and are triggered by, applications for new facilities, or renewals or modifications, the approval of which would constitute "major Federal actions significantly affecting the quality of the human environment."[24]

31. Finally, based on industry comments received in this proceeding, it is our expectation that, in fact, the vast majority of license renewal and facility modification applications will comply with the ANSI standard we are incorporating today into our NEPA processing guidelines.[25] Thus, our approval of such applications in most instances will not constitute a "major Federal action significantly affecting the quality of the human environment" so as to trigger environmental processing with respect to RF radiation. Therefore, as indicated earlier, we expect that most licensed operations seeking renewal or modification of a previously approved facility without increasing their RF emissions, would, in effect, be exempted from further Commission environmental processing of the particular application. Remaining then for such processing would be those applications which would not comply with the RF radiation standards, including a minority of applications for new facilities, license renewals, and modifications of existing facilities.

D. Evaluation of Compliance

32. Many respondents raised questions that related to the evaluation of whether a facility or operation was in compliance with a given standard. For example, American Telephone and Telegraph (AT&T) expressed its concern that "the intent of the proposed rule is not sufficiently clear and ... this slight ambiguity may result in an unnecessary burden to the Commission as well as applicants." AT&T argued that the proposed rule should address "real, not merely hypothetical, situations in which the emission or exposure guidelines would be exceeded." AT&T urged that the rule make specific reference to exposure "under normal working conditions" and "using standard maintenance and repair practices" and, with respect to public exposure, should make specific reference to exposure "in normally accessible areas."

33. Concern over measurement procedures, particularly in the near-field of a radiating source, was expressed by some respondents. Motorola felt that adoption of the proposed rules without establishing measurement

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one RF exposure standard in 1985. When it comes up for renewal seven years later, the application should be examined in the light of *current* environmental circumstances and RF exposure standards in 1992 in order to protect both environmental quality and the public health and safety at that time. Grandfathering such a facility in 1985, however, would preclude such an examination.

[24] *See, e.g.*, 40 C.F.R. §1508.18 defining "major Federal actions."

[25] *See, e.g.*, Comments of Motorola, Inc., the NAB, and the TVBAC, para. 11-13, *supra*.

procedures was "in effect, adoption of no [r]ules at all. . . . [E]nforcement of the rules could be next to impossible in near-field situations. We urge the Commission to promulgate [r]ules *only* after appropriate measurement procedures have been established. . . ." (emphasis in original). Motorola, therefore, suggested that the Commission consider relying upon the new ANSI standard as a basis for an RF radiation criterion in its NEPA processing rules because that standard provides for an alternative measurement technique for near-field exposure.

34. NAB also mentioned potential measurement problems and pointed out that far-field measurement techniques and formulas may not be applicable in the near-field. NAB suggested that broadcasters be allowed to rely on actual measurements made by qualified engineers in lieu of being obliged to use far-field formulas for characterizing RF energy levels.

35. In its comments, NAB also discussed the problem of locations where many different sources of RF energy are present. NAB contended that "[i]n some instances, there is no practical alternative but to locate a variety of transmitting antennas on one tall building or mountain peak. At these locations, the cumulative radiation levels might exceed the new ANSI standard—but almost never in any area accessible to the public." NAB suggested that the Commission should consider various methods to prevent exposure to hazardous radiation at these sites but maintained that "[n]o licensee or applicant should be subjected to special processing where transmitting equipment under that licensee's control by itself produces radiation levels not in excess of the standards."

36. In order to address these various concerns related to the determination of compliance with standards, and to give guidance to our licensees, we plan to issue a technical bulletin which will be developed by Commission staff before the effective date of our rule amendment. This bulletin will discuss prediction methodology, evaluation of exposure situations, measurement problems, multiple source siting, and other relevant issues. For example, in the case of a simple, isolated, broadcast antenna, a "worst-case" prediction for power density in the far-field of the antenna can be made by dividing the effective isotropic radiated power (EIRP) by either $4\pi R^2$ or πR^2 (depending on whether 100% ground reflection is assumed), where R = the minimum distance from the antenna where people might be exposed. Although generally applicable in the far-field, this prediction method could also be used to estimate a "worst-case" *upper limit* for intensities in the near-field of simple, isolated, broadcast antennas. The use of such a formula could provide *prima facie* evidence that a station would be in compliance with the ANSI standard. Other appropriate methods would be acceptable for evaluating compliance, including actual measurement data as suggested by NAB.

37. With regard to AT&T's concerns over the interpretation of standards, we believe that the ANSI standard on which we propose to rely is reasonably clear as to its applicability. Since we intend to rely on guidelines established and defined by a qualified, non-government, standard-setting organization, we are not in a position to rewrite or modify them. Such guidelines should be self-explanatory, and it will be the responsibility of the applicant to demonstrate compliance with them. However, to avoid confusion our forthcoming bulletin will discuss applicability of the ANSI standard and its interpretation. It should be emphasized that *accessibility* is a key factor in determining compliance with an exposure standard. Compliance can often be realized by appropriate restrictions on accessibility to the environment surrounding an RF transmitting source.

38. In the future, it is expected that various standard-setting agencies and organizations will be issuing information on prediction methods and measurement procedures for use in evaluating exposure to RF radiation. For example, ANSI, EPA, and NCRP (*see* para. 28, *supra*) are all working separately to develop further documentation on this topic. In the meantime, as noted, the ANSI C95.1-1982 standard incorporates certain measurement guidelines.[26] Therefore, our reliance on the ANSI standard should address the concerns expressed regarding the need for Commission clarification of measurement procedures.

39. Concerning the problem of multiple transmitters at the same location, if a proposed facility or modification would result in an incremental increase in RF radiation in an accessible area causing overall non-compliance with the specified guidelines, then we can see no practical way to address this situation other than to require an environmental assessment of the proposal. *Existing* facilities that are not proposing modifications in their operations or are not applying for renewal would not be subjected to NEPA processing under our rules. In the case of renewals at multiple-use sites, all licensees involved will be *jointly* responsible for resolving problems that may arise relative to exposure to RF radiation. Further guidance on evaluation of multiple-use situations will be provided in the bulletin.

E. Docket 79-163 and Categorical Exclusion

40. Motorola, Inc., although generally supporting the Commission's proposed rule, urged us to incorporate the substance of Docket No. 79-163

[26] *See* ANSI C95.3-1973, "American National Standard Techniques and Instrumentation for the Measurement of Potentially Hazardous Electromagnetic Radiation at Microwave Frequencies" and ANSI C95.5-1981, "American National Standard Recommended Practice for Measurement of Hazardous Electromagnetic Fields - RF and Microwave." Both publications are available from ANSI. *See* note 10, *supra*, for address.

into this rulemaking proceeding. Docket 79-163 involves amending the Commission's rules for implementing NEPA so that the rules will be in accordance with the latest directives of the Council on Environmental Quality (CEQ).[27] In particular, Motorola argued that the "categorical exclusion" principle of the rules proposed in Docket 79-163 should be incorporated here.[28] According to Motorola, incorporation of the categorical exclusion principle "will most effectively accommodate the likelihood that most applications for equipment authorizations or transmitting facilities will *not* have a significant affect [sic] on the quality of the human environment and thus be *explicitly excluded* from the Commission's environmental processing requirements." (emphases in original)

41. The Commission understands the concerns of Motorola regarding this issue. We believe, however, that it is beyond the scope of this present rulemaking proceeding to incorporate into it the substance of Docket No. 79-163. This present proceeding is narrowly limited in both scope and purpose and is designed solely and simply to add an RF radiation criterion to the Commission's environmental processing rules. Docket No. 79-163, on the other hand, is a much broader proceeding which would amend the entire set of Commission rules for implementing NEPA in accordance with revised NEPA regulations issued by the Council on Environmental Quality. We believe this latter proceeding deserves separate, thorough consideration by the Commission. Inclusion of this more extensive proceeding within the confines of the present rulemaking would only confuse the latter's consideration and delay its completion. With regard to Motorola's desire for "categorical exclusion" as proposed in Docket 79-163, we point out that, by establishing a threshold for radiation review under our NEPA procedures in Docket 79-144, we are, in effect, already categorically excluding certain types of transmitting operations and facilities. Moreover, we are proposing in the accompanying *Further Notice* a broader application of the principle of categorical exclusion.[29]

F. Federal Preemption of Local and State Standards

42. We continue to be aware that, largely due to the lack of a federal standard, various state and local jurisdictions around the country either have adopted or have proposed standards for exposure of the general public to RF radiation. The issue of federal preemption of such local and state RF standards was a recurring theme in many of the comments. Several of the respondents stressed the need for a federal radiation

[27] *See* 44 Fed. Reg. 38913 (1979).

[28] The CEQ guidelines allow agencies to identify actions which do not normally have a significant effect on the quality of the human environment and to "categorically exclude" such actions from environmental processing requirements. *See* 40 C.F.R. §§ 1500-1508, *et seq.*

[29] *See* para. 58, *infra*, for discussion of our proposal regarding categorical exclusion.

standard to preempt possibly inconsistent and nonuniform state and local regulation of RF radiation.[30] Others called for the issuance of a Commission policy statement on federal preemption of state and local RF exposure standards that may adversely affect operations and public availability of interstate telecommunications services.[31]

43. We have reviewed these comments closely and given the matter serious consideration. However, we do not believe it is necessary at this time to resolve the issue of federal preemption of state and local RF radiation standards.[32] Should non-federal RF radiation standards be adopted, adversely affecting a licensee's ability to engage in Commission-authorized activities, the Commission will not hesitate to consider this matter at that time.

G. Other Issues

44. Various respondents raised a few other issues, mostly dealing with particular operations or exposure situations. For example, the Radio Officers Union (ROU) of the National Marine Engineers' Beneficial Association, AFL-CIO, submitted comments pertinent to the maritime mobile service. Although ROU could foresee no RF hazards associated with conventional maritime radio transmitters and ship radar equipment, the union felt that shipboard satellite earth stations posed a potential hazard that should be promptly addressed by OSHA and the FCC. The ROU stressed that there are presently no safety regulations with regard to both installation and operation of ship earth terminals. According to the ROU, the primary hazard of such equipment results from their antennas frequently being mounted only a few feet above deck level. The union also expressed concern about port operation of satellite equipment with regard to tankers, LNG carriers, ammunition ships, and similar vessels, as well as the potential for exposure of persons standing dockside.

45. Some respondents urged the Commission to exclude certain types of transmitters from consideration under the NEPA processing rules because of the apparent incapacity of these devices to cause potentially

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[30] *See, e.g.*, Comments and Reply Comments of the American Radio Relay League (ARRL), and CBS, Inc.

[31] *See, e.g.*, Comments and Reply Comments of the TVBAC, and NAB, and Thomas C. Agoston.

[32] To our knowledge, only Portland and Multnomah County, Oregon, the Commonwealth of Massachusetts, the state of New Jersey, and the New York Port Authority have adopted RF radiation standards concerning general population exposure. The New York Port Authority standard applies solely to facilitites transmitting from the World Trade Center in New York City. A few other states are also considering the adoption of RF radiation exposure standards. For further details of these state and local actions, *see* comments or reply comments filed in this proceeding by the American Radio Relay League, the Association for Broadcast Engineering Standards, Inc., the National Association of Broadcasters, and the TV Broadcasters All Industry Committee.

hazardous exposure to RF radiation. For example, Motorola mentioned portable radios operating between 300 kHz and 1 GHz with output powers of seven watts or less. NAB suggested an exemption for mobile electronic news gathering ("ENG") equipment used by broadcasters. According to NAB, "these services also pose virtually no health hazard because of the transient nature of the exposure." NAB further urged the Commission to exclude all transmitters with power outputs below ten watts from the environmental assessment rules. Similarly, ARINC urged the Commission to exclude the aeronautical mobile service from consideration under Section 1.1305, and ARRL proposed an exemption for amateur radio.

46. These issues are important and are of concern to the Commission. Suggestions concerning the placement of antennas and the possible categorical exclusion of specific types of transmitters provide us with useful information that can be used in the development of FCC policy with respect to the evaluation of the environmental impact of Commission actions. Our rule amendment will only apply to transmitting facilities that, in our judgement, could have a significant environmental effect with regard to RF radiation exposure. Other types of transmitters such as those discussed above would be categorically excluded from the provisions of the rule as proposed in our *Further Notice*.[33]

47. Another topic mentioned by several respondents was the matter of FCC participation in the rulemaking activities of health and safety agencies such as EPA and OSHA. TVBAC pointed out that one of the original purposes of this docket was to provide documentation the Commission could use in assisting other government agencies in developing RF safety standards that would adequately take into account the impact of standards on FCC regulatees. TVBAC, ABES, and CBS all encouraged the Commission to be an active participant in the proceedings of other federal agencies. To quote TVBAC, "[t]he FCC should actively encourage and assist EPA and OSHA in developing definitive national RF radiation standards with due regard for their effect on publicly important communications services."

48. In this context, it should be noted that the Commission has cooperated with EPA in its development of "Federal Guidance" for public exposure to RF radiation. The Commission has participated in meetings of an interagency working group that was established by EPA to assist it in preparation of its guidelines. The FCC also maintains a liaison relationship with other agencies which may be involved in future standard-setting activities with regard to RF radiation.

[33] *See* para. 58, *infra.*

IV. Conclusions

49. As a result of our consideration of the comments and reply comments received in this proceeding and an analysis of the Commission's statutory obligations, we have come to the following conclusions regarding potential radiofrequency (RF) radiation hazards from FCC-regulated operations and facilities. Although the Commission has neither the expertise nor the authority to develop its own health and safety standards, we are required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321 *et seq*. (1976), to consider whether Commission actions will significantly affect the quality of the human environment, 42 U.S.C. §4332(2)(c). For this reason, we are today amending our rules implementing NEPA to provide for assessment under our environmental rules of applications for construction permits or licenses to transmit, including renewals and modifications thereof, which would result in non-compliance with applicable health and safety standards for exposure to RF radiation. Our concern is that any significant impact on the human environment with respect to RF radiation should be taken into account as a part of Commission procedures for approving transmitting facilities and operations.

50. We had originally proposed to evaluate exposure of the population at large on the basis of the advisory guidelines issued by the Occupational Safety and Health Administration (OSHA) for exposure of workers to RF radiation. However, the OSHA radiation protection guide was based on a non-government exposure standard which has since been revised in light of current knowledge of the biological effects of RF radiation. The revised standard is written to apply to both workers *and* the general public. Several respondents in this proceeding urged us to use this widely recognized RF exposure standard, issued in 1982 by the American National Standards Institute (ANSI), as an interim guideline. Some respondents, including the EPA, expressed concern over our original proposal to use a standard that may not offer sufficient protection for the public with regard to radiation exposure. Additionally, the Office of Management and Budget has encouraged government use of voluntary, non-government standards whenever possible.

51. We believe the fact that there are currently no mandatory federal standards for exposure of the public to RF radiation does not excuse us from our obligations under NEPA to evaluate FCC actions for significant environmental impact. Therefore, we have modified our original proposal by adding a provision for using the revised ANSI standard as a processing guideline for human exposure to RF radiation. The ANSI standard will be the triggering mechanism for environmental assessment in all situations where our rule amendment applies.

52. We believe that applications for transmitting facilities which are in compliance with applicable health and safety standards for RF radiation would not ordinarily have a significant effect on the environment and thus would not fall within our NEPA analytical processes, at least with regard to RF radiation. On the other hand, applications for facilities that are not in compliance with applicable health and safety standards for RF radiation will require a more thorough analysis of their environmental impact.[34] The amendment to our rules that we are making today will assure that analysis. In our view then, our statutory obligations under NEPA with respect to RF radiation will have been satisfied.

53. Therefore, we are today adding a new paragraph (d) to Subpart I of Part 1 of the Commission's Rules (*see* Appendix 1).[35] Under this rule, a narrative environmental statement and processing under our NEPA rules will be required for initial and renewal licensing applications or for applications seeking modifications of existing facilities for the services and facilities listed below if the operation in question would not comply with applicable guidelines for exposure of workers or the general public to radiofrequency radiation. This rule change uses noncompliance with guidelines issued by a widely recognized, non-government organization as the processing trigger for invoking our environmental processing procedures.

54. The rule amendment we are adopting today will initially only apply to actions taken by the Commission with respect to the following facilities authorized by the FCC Rules and Regulations: (1) broadcast facilities authorized under Part 73; (2) broadcast facilities authorized under Part 74

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[34] It should also be noted that under the Commission's present rules implementing NEPA, the Commission may, on its own motion or on the motion of an interested person, decide that the preparation of an environmental impact statement is warranted. 47 C.F.R. §1.1305(c) (1977). *See also* 47 C.F.R. §1.1313(b)(2) with regard to staff responsibility for preparing a draft environmental impact statement.

[35] The final language of the rule we are issuing has been modified from the text of the proposed rule in several respects, all of which, we believe, are within the scope of our original NPRM. We have modified the proposed rule so that it will only apply to certain services and have added a note to that effect. We have clarified the introductory clause to make clear that we are adding to the "major actions" listed in paragraph (a) and to the provisions of paragraph (c) of Section 1.1305 of the Commission's NEPA rules. We have deleted the proposed paragraph dealing with *emission* standards for RF radiation since the only applicable standard would be the one established for microwave ovens by the Food and Drug Administration, and no evidence has been presented that microwave ovens constitute a hazard to the public from RF radiation. We have added language to clarify the applicability of this rule to license renewals and modifications of existing facilities, as fully explained in para. 29-31, *supra*. We have revised the language in paragraph (d) to incorporate by reference into our NEPA processing rules the ANSI standard, C95.1-1982. Finally, we have deleted reference to federal standards or guidelines in order to allow for flexibility in our consideration of the applicability of such standards or guidelines to our statutory obligations under NEPA.

(Subparts A and G only); (3) satellite-earth stations authorized under Part 25; and (4) experimental facilities authorized under Part 5. Based on information received to date in this proceeding, we believe that there is sufficient evidence that transmitting facilities in these categories could possibly create situations in which applicable safety standards for exposure to RF radiation might be exceeded. Because facilities in the above categories may operate with relatively high power levels or may be located in or near accessible areas, such facilities will be subject to this rule amendment and possible NEPA processing.

55. Maximum power limitations for broadcast facilities authorized under Part 73 range from 50 kilowatts (AM radio) to over 5 megawatts (UHF television). Also, for applicable Part 74 facilities there are no limitations on maximum power under Subpart A (experimental broadcast stations), and under Subpart G (low power television) no maximum for effective radiated power is stipulated. Therefore, these various broadcast facilities may operate with effective radiated powers (ERP) of thousands to millions of watts. Since broadcast transmitters are sometimes located in areas that are accessible to workers or the general public, and broadcast stations generally transmit over major portions of a 24 hour day, it is possible that such transmitters could cause exposures in excess of safety standards. Moreover, comments filed previously in this proceeding presented evidence that it is possible for some broadcast facilities to create conditions that might lead to significant human exposure to RF radiation.[36]

56. Transmitting satellite-earth stations authorized under Part 25 of the FCC Rules and Regulations operate with very high ERPs. However, the high degree of directionality of the transmitted beam makes excessive exposure unlikely. Our experience over the past several years in this area and on-site measurements have demonstrated that normal design and operating practice make it highly unlikely that workers or the general public would be exposed to excessive levels of RF radiation from these facilities. Nevertheless, we believe it necessary to subject these facilities to the provisions of this rule because of the high amounts of RF energy involved. Similarly, experimental facilities authorized under Part 5 may operate with relatively high power levels, and, therefore, will be subject to this rule amendment.

57. It should be noted at this point that we have already been reviewing radiation hazards of land based satellite-earth stations as part of our domestic satellite-earth station licensing process since our 1972 *Memorandum Opinion and Order* in Docket No. 16495.[37] Since the rule

[36] *See* NPRM, note 1, *supra*, at para. 19, 39-43, 95-96.

[37] *See* In the Matter of *Establishment of Domestic Communications-Satellite Facilities by Non-Government Entities*, 38 F.C.C. 2d 665, 700-704 (1972).

amendment we adopt today will be applicable to satellite-earth stations authorized under Part 25 of the FCC Rules, it will supersede the 1972 action.

58. With regard to other categories of FCC-regulated operations and facilities, because of relatively low operating power levels, intermittent use, or relative inaccessibility, it appears unlikely that they would cause exposure in excess of safety standards during routine use. Therefore, we are today also issuing a *Further Notice of Proposed Rule Making*[38] in which we propose to exclude from the provisions of this rule other transmitting facilities and sources which are not included in the categories listed above. Through this *Further Notice* we are soliciting information, comments, opinions, and suggestions relevant to the legitimacy of this proposed categorical exclusion. Comments received in response to this *Further Notice* will be used to determine whether further revisions are necessary at this time in the FCC's rules with respect to this issue and whether there are other RF sources and transmitting facilities which should be subject to this rule amendment. As discussed in note 34, *supra*, even though we are proposing to exclude a large number of Commission actions from consideration under this rule, the Commission "on its own motion or on motion of any interested person, may determine that the environmental consequences of a particular action are such as to warrant preparation of an environmental impact statement." *See* § 1.1305(c) of the FCC Rules and Regulations.

59. In our *Further Notice* we are also proposing the inclusion of shipboard-satellite earth stations, authorized under Part 83, Subpart AA, of the FCC Rules and Regulations, in the category of facilities to which our rule amendment would apply. We believe that, because of the relatively high effective radiated power of ship-satellite earth stations, and because of the questions regarding safety raised by the ROU, an environmental analysis of some of these transmitters may be necessary. Even though the transmitted beams from these antennas are highly directional, there may be reason to be concerned over the possibility of excessive exposure. However, we point out that at this time the inclusion of these facilities is only a proposal, and we believe that a complete record in support of this action is needed. We invite comment on this proposal.

60. Regarding paperwork burden, it should be noted that most applicable FCC forms already incorporate, or will be modified to incorporate, a short provision inquiring as to whether the application would constitute a major action under our NEPA rules. This check-off procedure will still be applicable with regard to the amended rule. Moreover, we believe that the overwhelming majority of applications to the Commission

[38] *Further Notice of Proposed Rule Making*, Gen. Docket 79-144, Fed. Reg. (1985).

will not be subject to environmental impact analysis as provided for in our NEPA rules and by this amendment.

61. While we are aware of the adoption of standards in this area by local and state authorities, we do not believe it is necessary at this time to resolve the issue of federal preemption of state and local RF radiation standards. Should non-federal standards be adopted, adversely affecting a licensee's ability to engage in Commission-authorized activities, the Commission will not hesitate to consider this matter at that time.

62. In summary, because of the requirements of the National Environmental Policy Act, we are adopting an amendment to Part 1 of our rules which will enable the Commission to consider whether its actions will significantly affect "the quality of the human environment" with respect to human exposure to radiofrequency radiation. At the present time we will rely on provisions of the ANSI RF radiation standard as a processing guideline to evaluate applications under our environmental processing rules. We believe that our use of the widely recognized ANSI standard will, at this time, best meet our obligations under NEPA for environmental analysis of exposure to RF radiation.

V. Regulatory Flexibility Act Final Analysis [39]

A. Reason for action

The Commission has considered comments received in response to its *Notice of Proposed Rule Making* in Docket 79-144. The comments received generally support the view that a clarification of Commission responsibilities is required to avoid confusion among those entities regulated by the Commission regarding their own responsibilities with respect to potential hazards of radiofrequency (RF) radiation. Furthermore, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.* (1976), requires the Commission to consider whether the facilities and operations it licenses or authorizes will significantly affect "the quality of the human environment." For these reasons, we are amending our rules implementing NEPA to address situations involving non-compliance with standards for exposure to RF radiation.

B. The objective

The Commission is amending its rules implementing NEPA in order to clarify its policy with regard to potential hazards from RF radiation emitted by transmitting facilities that we license or authorize and to comply with our legal obligations under NEPA.

[39] This analysis is made pursuant to the provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. §603.

C. Legal basis

This action is based on the obligations imposed on the Commission by NEPA, *supra*, and is in furtherance of §§ 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 303(r) (1978). These provisions permit the Commission to make rules and regulations not inconsistent with other existing laws, "as may be necessary in the execution of its functions," and "to carry out the provisions of" the Communications Act.

D. Description, potential impact and number of small entities affected

It is expected that there will be no significant impact on most small entities that the FCC regulates. Small entities that may be in violation of present or future health and safety standards for RF radiation could be affected because of corrective actions that might be necessary to bring them into compliance. However, we believe that the great majority of the facilities licensed or authorized by the Commission will be in compliance with the indicated radiation guidelines.

E. Recording, recordkeeping, and other compliance requirements

No specific record-keeping requirements are contained in the new rules. Certain applicants for construction permits, licenses, renewals, and facility modifications may be expected to show compliance with an RF radiation exposure standard. "Major actions," as defined under our NEPA rules, will include facilities not in compliance with provisions of standard C95.1-1982 recommended by the American National Standards Institute. Applicants for construction permits, licenses to transmit or renewals thereof, or modifications to existing facilities must notify the Commission when the operation in question would not comply with the provisions of the guidelines indicated in Section 1.1305(d) and indicate what corrective measures or precautions will be taken to assure compliance. Such notice can be provided through applicable FCC forms which already incorporate, or will be modified to incorporate, a short provision inquiring as to whether particular applications constitute a "major action" under our NEPA rules.

F. Federal rules which overlap, duplicate, or conflict with these rules

There are none of which we are aware. This action is designed to bring our rules into compliance with the provisions of NEPA, as well as to inform our regulatees what the Commission expects of them with regard to RF radiation exposure. We are pointing to existing or future standards and regulations which may apply to our regulatees, and no overlap or duplication is foreseen.

G. Any significant alternative minimizing impact on small entities and consistent with the stated objective

Because of our legal obligations under NEPA, we believe it necessary to amend our rules to address the environmental impact of RF radiation emitted from transmitting facilities we authorize. We see no reasonable alternative to this action, and the new rule appears to offer the most logical approach to assure compliance with applicable standards. There are alternative ways of addressing this issue. For example, we might have considered adopting our own radiation standards independent of those set by other agencies. Such standards could conceivably have less impact (or more) on small entities. However, we believe that we have neither the expertise nor the authority to set health and safety standards, and we choose to defer to other agencies or a qualified non-government organization in establishing safe levels for RF radiation. We might also have chosen to take no action at all. However, this would be inadvisable for at least two reasons. First, we are legally obligated under NEPA to determine whether Commission "major actions" significantly affect "the quality of the human environment." Secondly, we believe that our regulatees desire and expect us to clarify our mutual responsibilities in this important area of growing public concern.

VI. Ordering Clauses

ACCORDINGLY, IT IS ORDERED that, effective October 1, 1985, Part 1 of the Commission's Rules and Regulations, 47 C.F.R. Part 1, IS AMENDED as set forth in Appendix 1, and that the amendment will be applicable to applications filed on or after this effective date. This action is taken pursuant to the provisions of Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.

Further information on this matter may be obtained by contacting Dr. Robert Cleveland, Office of Science and Technology, (202) 632-7040, or Mr. Stephen Klitzman, Office of General Counsel, (202) 632-6405.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix 2 -may be seen in the FCC Dockets Branch, 1919 M Street, N.W., Washington, D.C.

Appendix 1

Subpart I, Part 1, Chapter 1 of Title 47 of the Code of Federal Regulations is amended by adding a new paragraph (d) to Section 1.1305 to read as follows:

Section 1.1305 Major actions

* * * * *

(d) In addition to the actions listed in paragraph (a) and to the provisions of paragraph (c) of this section, and notwithstanding the provisions of paragraph (b) of this section, Commission actions granting construction permits, licenses to transmit or renewals thereof, or Commission actions authorizing modifications in existing facilities, will be treated as major actions if the facility or operation in question would result in exposure of workers or the general public to levels of radiofrequency radiation in excess of the "Radio Frequency Protection Guides" recommended in "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz," (ANSI C95.1-1982), issued by the American National Standards Institute (ANSI), 1430 Broadway, New York, New York 10018, and copyright 1982 by the Institute of Electrical and Electronics Engineers, Inc., 345 East 47th Street, New York, New York 10017.

Note: The provisions of paragraph (d) shall only apply to facilities and services licensed or authorized under Parts 5, 25, 73, and 74 (Subparts A and G only) of the FCC Rules and Regulations.

National Environmental Policy Act of 1969
Radiation
Radiation, Electromagnetic, Hazardous Level
Radiation, Exposure
Radiation, Radio Frequency

Further Notice of Proposed Rule Making adopted proposing to amend §1.1305 to exclude from provisions of §1.1305(d) specific categories of facilities that transmit relatively low levels of radiofrequency electromagnetic radiation, Also, proposes to include shipboard satellite-earth terminals in the category of facilities to which §1.1305(d) applies.
—*Amendment of Part 1*
Gen. Docket No. 79-144

FCC 85-91

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Responsibility of the Federal Communications Commission to consider biological effects of radiofrequency radiation when authorizing the use of radiofrequency devices.	Gen. Docket No. 79-144
Potential effects of a reduction in the allowable level of radiofrequency radiation on FCC authorized communications services and equipment.	

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: February 26, 1985; Released: March 14, 1985

BY THE COMMISSION:

1. On January 28, 1982, the Federal Communications Commission (FCC) adopted a *Notice of Proposed Rule Making* (NPRM) in the above

proceeding.[1] Our NPRM followed a *Notice of Inquiry* (NOI)[2] initiated by the Commission, in 1979, to provide us with information relevant to potential hazards from radiofrequency (RF) radiation and the FCC's responsibilities to consider such hazards when we license or authorize facilities and equipment.

2. The Commission has today adopted a *Report and Order*[3] in this proceeding that amends our rules[4] implementing the National Environmental Policy Act of 1969 (NEPA).[5] The amendment provides for environmental analysis of Commission actions that would result in noncompliance with applicable health and safety standards for RF radiation. Our concern is that any significant impact on the human environment with respect to RF radiation should be taken into account as a part of Commission procedures for approving transmitting facilities and operations.

3. The rule amendment adds another category to our list of "major actions" that are subject to our environmental processing procedures. Under this amendment a Commission action granting a construction permit, a license to transmit, or renewal thereof, or a modification in an existing facility, would be a major action of the facility in question would result in noncompliance with applicable health and safety standards for RF radiation.

4. Our rule amendment provides for Commission reliance on a nongovernment safety standard for RF radiation exposure as a processing guideline.[6] We believe that the current absence of enforceable federal standards for RF radiation exposure does not excuse us from our legal obligations under NEPA, and the ANSI standard, upon which we will rely, will be used as a triggering mechanism for applications requiring environmental processing.

5. The *Report and Order* stipulates that the ANSI standard will only apply to actions taken by the Commission with respect to the following facilities authorized by the FCC Rules and Regulations: (1) broadcast facilities authorized under Part 73; (2) broadcast facilities authorized

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[1] *Notice of Proposed Rule Making*, General Docket No. 79-144, 47 Fed. Reg. 8214 (1982), 89 F.C.C. 2d 214 (1982). *See also* 47 Fed. Reg. 10871 (1982) and 47 Fed. Reg. 27384 (1982) (*Correction* and *Order Extending Time for Filing Comments and Reply Comments*).

[2] *Notice of Inquiry*, General Docket No. 79-144, 44 Fed. Reg. 37008 (1979), 72 F.C.C. 2d 482 (1979).

[3] *Report and Order*, Gen. Docket 79-144, Fed. Reg. (1985).

[4] 47 C.F.R. §§1.1301 *et seq.*

[5] 42 U.S.C. §§ 4321 *et seq.* (1976).

[6] The non-government standard that we are relying on is "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz" (ANSI C95.1-1982) of the American National Standards Institute (ANSI), copyright 1982 by the Institute of Electrical and Electronics Engineers, Inc., New York, N.Y. 10017. *See* note 3, *supra*, for further details.

under Part 74 (Subparts A and G only); (3) satellite-earth stations authorized under Part 25; and (4) experimental facilities authorized under Part 5. Based on information received to date in this proceeding we believe there is sufficient evidence that transmitting facilities in these categories could possibly create situations in which applicable safety standards for exposure to RF radiation might be exceeded. Therefore, such sources and facilities will be subject to our rule amendment and possible NEPA processing.

6. We are proposing in this *Further Notice* also to include shipboard-satellite earth stations, authorized under Part 83, Subpart AA, of the FCC Rules and Regulations, in the category of facilities to which this rule amendment would apply. The Radio Officers Union (ROU) of the National Marine Engineers' Beneficial Association, AFL-CIO, submitted comments pertinent to ship-satellite earth stations in their filing before the Commission in response to our NPRM.[7] According to the ROU, the primary hazard created by this equipment is a result of antennas that are frequently mounted only a few feet above deck level. We believe that the allowed ERP's of these transmitters are high enough so that an analysis of their operation may be warranted, even though the transmitted beams are highly directional. There may be reason to be concerned over the possibility of excessive exposure of persons on deck and also of persons standing alongside docked vessels when these transmitters are in operation. However, although the ROU has indicated that a potential hazard already exists with respect to these transmitters, we feel that the establishment of a more complete record on the potential hazards of shipboard transmitters is needed. For example, COMSAT General Corporation filed comments earlier in this proceeding[8] stating that human exposure from maritime satellite ship terminals should be well *below* the ANSI standard, an apparent contradiction of ROU's contention. We invite comment on this issue and on our proposal to apply the rule amendment to ship-satellite terminals.

7. With regard to transmitting facilities to which our rule amendment will initially apply, there appears to be sufficient evidence that human exposure in excess of safety standards might occur, thereby having a significant effect on the human environment. However, other types of RF sources authorized by the Commission may not create opportunities for overexposure, and we are, therefore, proposing to categorically exclude these transmitters and facilities from consideration under this rule amendment.[9] The excluded transmitters would encompass all FCC-

[7] *See Report and Order*, note 3, *supra*, at para. 44.

[8] *See* NPRM, note 1, *supra*, at para. 51.

[9] The NEPA guidelines issued by the Council on Environmental Quality permit agencies to exclude categorically from environmental processing those actions "which do not

regulated RF sources not discussed above. The major excluded transmitters would be land-mobile equipment (both private and common carrier), microwave point-to-point transmitters, amateur radio facilities, aviation and marine stations (other than shipboard-satellite terminals), and low-powered broadcast equipment not listed above. In comments filed previously in this proceeding the Commission was urged to exclude many of these transmitters from the provisions of our rule amendment because of their relatively low power levels, the intermittent nature of their use, or their general inaccessibility. Data submitted generally supported such an exclusion.[10]

8. Land-mobile base stations generally operate at relatively low power levels and are not normally accessible to the public. In addition, they transmit intermittently, rather than continuously, as in the case of a broadcast transmitter. We believe that these factors combine to make it unlikely that human exposure in excess of safety standards would result from the emission of RF energy from these transmitters.

9. Mobile transmitters in the land-mobile services generally operate with power levels even lower than base stations, and, although accessibility may be more of a problem, the intermittent operation of these transmitters serves to mitigate total exposure. It is important to note that portable transmitters with input powers of seven watts or less and operating at frequencies of 300 kHz to 1 GHz are excluded from the ANSI standard due to the opinion of ANSI that such transmitters generally do not cause exposures in excess of the recommended levels.

10. In the case of private and common carrier microwave point-to-point communications equipment, low power (20 watts or less), general inaccessibility, and the high directionality of the transmitted beam make excessive human exposure highly unlikely. Therefore, it seems reasonable to exclude these sources from the provisions of our rule amendment. Other common carrier services would also be excluded because of their relatively low power levels, their general inaccessibility, the intermittent nature of their use, or combinations of the above.

11. For similar reasons, we propose to exclude the amateur radio service from the provisions of this rule amendment. In comments filed in this proceeding by the American Radio Relay League, evidence was presented that amateur operations, because of their intermittent nature and relatively low power levels, do not normally present a hazard to the

individually or cumulatively have a significant effect on the human environment . . .," 40 C.F.R. §1508.4 (1980).

[10] *See Report and Order*, note 3, *supra*, at para. 45. *See also* NPRM, note 1, *supra*, at para. 22-35, and 44-50.

public from RF radiation.[11]

12. This *Further Notice* proposes to exclude from the provisions of the rule adopted today transmitting facilities and sources not specifically included in the amendment to our list of major actions for NEPA purposes. We believe that such transmitters generally do not individually or cumulatively have a "[significant effect on] the quality of the human environment"[12] under normal operating conditions and can, therefore, be exempted from consideration under the RF radiation amendment to our rules for environmental processing. Although we believe that our proposed exclusions are supportable, we wish to establish a more complete public record before making a final decision. Therefore, the purpose of this *Further Notice* is to request public comment on our proposed exclusion of various radio services from environmental processing with regard to RF radiation hazards.[13]

13. We are proposing that the Note in Section 1.1305(d) of the FCC rules and Regulations be amended to provide for this categorical exclusion (*see* Appendix). As previously discussed, we are also proposing to include shipboard-satellite earth stations in the category of facilities to which §1.1305(d) would apply. Through this *Further Notice* we are soliciting information, comments, opinions, and suggestions regarding our proposals. Comments received in response to this *Further Notice* will be used to determine whether our proposals are supportable and reasonable or whether further revisions in the FCC's rules may be necessary with respect to RF radiation processing issues. Listed below are several specific questions that will indicate the type of information that would be helpful in our deliberations. Although we recognize that some information of this type has already been provided in our NOI and NPRM in this proceeding, there may be more recent data and information that would be useful to us.

14. Specific Questions

(a) What typical and "worst case" electric and magnetic field-strength levels occur near RF transmitters in areas that are accessible to the public or to workers? How were these levels determined? How likely is it that people would be exposed at "worst case" levels? Of special interest are:

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[11] *See* NPRM, note 1, *supra*, at paragraphs 26, 50, 181. *See also* Comments and "Petition for Expedited Special Relief and Declaratory Ruling," filed by the American Radio Relay League, Inc., as noted in the *Report and Order*, note 3, *supra*, at para. 16 and 45.

[12] *See* National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.* (1976), at §4332(2)(c).

[13] It should be noted that even though we are proposing to exclude a large number of Commission actions from consideration under this rule, the Commission "on its own motion or on motion of any interested person, may determine that the environmental consequences of a particular action are such as to warrant preparation of an environmental impact statement." *See* §1.1305(c) of the FCC Rules and Regulations.

(1) base stations and mobile stations in the private land-mobile and common carrier services, (2) amateur radio stations, (3) other fixed and mobile transmitters operating at relatively low power levels, and (4) shipboard-satellite earth stations.

(b) What methods are available for predicting typical electric and magnetic field-strength levels in the vicinity of these transmitters, particularly in the near-field where human exposure might occur? Can field-strength levels be approximated by simple calculations or nomograms?

(c) What measurement equipment and procedures are available for determining typical field-strength levels around such transmitters, and how accurate are these measurements?

(d) Determination of compliance with time-averaged standards is dependent on a knowledge of the duty factor, i.e., the typical fraction or percentage of time that the equipment is actually transmitting. What are typical duty factors for land-mobile and other transmitters, particularly mobile units, and how can duty factors best be estimated to determine compliance with health and safety standards for RF radiation?

(e) Measurements reported by the Environmental Protection Agency and the National Bureau of Standards have indicated that electric field strength levels inside and outside of vehicles with roof-mounted land-mobile antennas could conceivably exceed the ANSI recommended limits.[14] Are such field-strength levels typical for routine operations, and, if so, what measures could be taken to reduce them?

(f) Section 4.2 of the ANSI protection guides provides that at frequencies between 300 kHz and 100 GHz, "the protection guides may be exceeded if the exposure conditions can be shown by laboratory procedures to produce specific absorption rates (SARs) below 0.4 W/kg as averaged over the whole body, and spatial peak SAR values below 8 W/kg as averaged over any one gram of tissue." A recent report[15] on human absorption of RF energy from vehicle-mounted cellular radio antennas

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[14] *See* (1) Lambdin, D.L., "An Investigation of Energy Densities in the Vicinity of Vehicles with Mobile Communications Equipment and Near a Hand-held Walkie-Talkie, "U.S. Environmental Protection Agency, Report No. ORP/EAD 79-2, March 1979; (2) Adams, J.W., et al., "Electromagnetic Interference (EMI) Radiative Measurements for Automobile Application," U.S. Department of Commerce, National Bureau of Standards, NBS Technical Note 1014, June 1979. Copies of these two reports have been inserted into the record of General Docket 79-144.

[15] *See* Guy, A.W. and C.K. Chou, "Impact of the RF Radiation Controversy on Cellular Mobile Telecommunications Systems," p. II-7 to II-17, Proceedings, International Congress on Transportation Electronics, October 22-24, 1984, sponsored by the Vehicular Technology Society—Institute of Electrical and Electronics Engineers, Inc. and Society of Automotive Engineers. IEEE catalog number: 84CH1988-5. Library of Congress Catalog Card Number: 83-83036. A copy of this article has been inserted into the record of General Docket 79-144.

concluded that, "the mobile-antenna system can be operated safely . . . within the guidelines of the ANSI exclusion clause for input powers up to 35 W." In view of the fact that Section 90.635(d) of the FCC Rules and Regulations allows 800 MHz mobile station output powers of up to 100 watts, what is the likelihood that such stations would cause human absorption of RF energy in excess of the ANSI limits?

(g) Would it be feasible for manufacturers of transmitting equipment to provide information to users on how best to ensure compliance with relevant RF safety standards? If so, should this be required of all manufacturers of such equipment, and should the Commission consider such information as part of our equipment authorization procedures?

(h) How can access to land-mobile transmitters, particularly mobile units, best be controlled to minimize risk, if any, to users and to the public? Are there mounting or design modifications that can reduce ambient RF fields around vehicle-mounted antennas?

(i) We are proposing to include shipboard-satellite earth stations, authorized under Part 83, Subpart AA, of the FCC Rules and Regulations, in the category of facilities to which Section 1.1305(d) would apply. Is this inclusion justifiable, and is there, indeed, cause for concern over potential hazards from these transmitters? What about other types of shipboard RF sources such as radar and HF antennas? Please provide data and specific evidence to support your comments.

(j) Are there transmitters or transmitting facilities that our proposal would exclude from NEPA processing that could, in fact, result in human exposure in excess of the ANSI guidelines during routine use? If so, please explain and include supportive data or evidence.

15. Comments received in response to this *Further Notice* will be used to evaluate the above issues and to determine whether the Commission's proposal will enable the FCC to best meet its responsibilities under NEPA with regard to assessing the environmental effects of RF radiation. Information developed in this proceeding will also enable us to assist other government agencies that may be developing standards or recommendations in this area. Comments are invited from manufacturers, industry users and associations, unions and labor organizations, consumers, Commission licensees in any service, other government agencies, and all other interested parties.

Ex-Parte Presentations

For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that *ex-parte* contacts are permitted from the time of issuance of a notice of proposed rule making until the time a draft order proposing a substantive disposition of such proceeding is placed on the Commission's Sunshine Agenda. In general, an *ex-parte* presentation is any written or oral communication (other than formal

written comments/pleadings and oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex-parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex-parte* presentation addressing matters not fully covered in any written comments previously filed in the proceeding must prepare a written summary of that presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex-parte* presentation discussed above must state on its face that the Secretary has been served and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1201 *et seq.* of the Commission's rules, 47 C.F.R. §§1.1201 *et seq.*

Regulatory Flexibility Act Final Analysis[16]

A. Reason for action

This Commission has considered comments received in response to its *Notice of Proposed Rule Making* in Docket 79-144. The comments received generally support the view that a clarification of Commission responsibilities is required to avoid confusion among those entities regulated by the Commission regarding their own responsibilities with respect to potential hazards of radiofrequency (RF) radiation. Furthermore, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321 *et seq.* (1976), requires the Commission to consider whether the facilities and operations it licenses and approves will significantly affect "the quality of the human environment." For these reasons, we are amending our rules implementing NEPA to address situations involving noncompliance with standards for exposure to RF radiation.

This *Further Notice* has two parts. First, it proposes to exclude certain categories of transmitting facilities and operations from environmental processing with regard to RF radiation because of the lack of evidence that they would significantly affect the quality of the human environment. Second, the *Notice* proposes including another category of facilities to which the rule amendment applies because of evidence that it could potentially have a significant effect on the environment due to the emission of RF radiation.

B. The objective

The Commission is amending its rules implementing NEPA in order to clarify its policy with regard to potential hazards from RF radiation

[16] This analysis is made pursuant to the provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. §603.

emitted by transmitting facilities that we license or authorize and to comply with our legal obligations under NEPA. The objective of this *Further Notice* is to limit environmental processing under our rules only to those facilities and operations which could potentially have a significant effect on the human environment due to RF radiation.

C. Legal basis

This *Notice* and the accompanying *Report and Order* result from obligations imposed on the Commission by NEPA, *supra*, and are in furtherance of §§4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), and 303(r) (1978). These provisions permit the Commission to make rules and regulations not inconsistent with other existing laws, "as may be necessary in the execution of its functions," and "to carry out the provisions of" the Communications Act.

D. Description, potential impact and number of small entities affected

It is expected that there will be no significant impact on most small entities that the FCC regulates because the primary purpose of this *Notice* is to exclude from environmental processing small entities that would not significantly affect the human environment due to the emission of RF radiation. Small entities that may be in violation of present or future health and safety standards for RF radiation could be affected because of corrective actions that might be necessary to bring them into compliance. However, we believe that the great majority of the facilities licensed or authorized by the Commission will be in compliance with the indicated radiation guidelines.

E. Recording, recordkeeping, and other compliance requirements

No specific record-keeping requirements would be required by our proposals. Furthermore, because this *Notice* proposes to exclude many applicants from environmental processing with respect to RF radiation, no compliance requirements would be instituted with regard to such operations and facilities. Applicants for shipboard-satellite terminal construction permits, licenses, renewals, and facility modifications may be expected to show compliance with an RF radiation exposure standard in the future as a result of this *Notice*. However, such a showing could be provided through applicable FCC forms which will be modified to incorporate a question on environmental impact.

F. Federal rules which overlap, duplicate, or conflict with these rules

There are none of which we are aware. This *Notice* and the accompanying *Report and Order* are designed to bring our rules into compliance with the provisions of NEPA, as well as to inform our regulatees what the Commission expects of them with regard to RF radiation exposure. We

are pointing to existing or future standards and regulations which may apply to our regulatees, and no overlap or duplication is foreseen.

G. Any significant alternative minimizing impact on small entities and consistent with the stated objective

Because of our legal obligations under NEPA, we believe it necessary to amend our rules to address the environmental impact of RF radiation emitted from transmitting facilities we authorize. We see no reasonable alternative to this action, and our proposed categorical exclusion of certain transmitting facilities and operations minimizes impact on small entities to the greatest extent feasible.

ACCORDINGLY, IT IS ORDERED that, pursuant to the provisions of Section 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, there is hereby instituted a *Further Notice of Proposed Rule Making* in this proceeding.

IT IS FURTHER ORDERED that all interested persons may file comments on the matters discussed in this notice on or before June 19, 1985. Reply comments shall be filed on or before July 19, 1985. In accordance with Section 1.419 of the Commission Rules, 47 C.F.R. § 1.419, an original and five (5) copies of all filings shall be furnished the Commission. Copies of comments and reply comments filed in this proceeding will be available for public inspection during regular business hours in the Commission's reference room at 1919 M Street, N.W., Washington, D.C. 20554.

For further information concerning this proceeding contact Dr. Robert Cleveland, Office of Science and Technology, (202) 632-7040, or Mr. Stephen Klitzman, Office of General Counsel, (202) 632-6405.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

It is proposed to amend Subpart I, Part 1, Chapter 1 of Title 47 of the Code of Federal Regulations by changing the Note following Section 1.1305(d) to read as follows:

Note: The provisions of paragraph (d) shall only apply to facilities and services licensed or authorized under Parts 5, 25, 73, 74 (Subparts A and G only), and 83 (Subpart AA only) of the FCC Rules and Regulations. Facilities and services licensed or authorized under all other Parts or Subparts of the FCC Rules and Regulations shall be excluded from consideration under paragraph (d), unless such exclusion is superseded by actions taken by the Commission under the provisions of paragraph (c) of this section.

Common Carrier, International
Reports to FCC

Report and Order adopted amending traffic data reporting requirements for international telecommunications carriers.
—*Amendment of Section 43.61*
CC Docket No. 79-262

FCC 85-219

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Amendment of Section 43.61 of the Commission's Rules to Update and Simplify the Required Traffic Data Reports Filed by International Telecommunications Carriers.	CC Docket No. 79-262

REPORT AND ORDER

Adopted: April 26, 1985; Released: May 15, 1985

BY THE COMMISSION

I. Introduction

1. Section 43.61 of the Commission's Rules and Regulations, 47 C.F.R. § 43.61 (1983), requires those common carriers which provide international telecommunications services to file reports with the Commission containing data on overseas traffic. Such data assist the Commission's efforts in evaluating applications for international facilities, considering facility planning options, monitoring the development and competitiveness of each international market, formulating policies consistent with the public interest and gauging the competitive impact of our decisions on the market. The current reporting rules were promulgated in 1964 and have never been amended.[1]

2. Pursuant to Section 43.61, reports are filed twice a year covering the periods of January through June and January through December, respectively. These reports contain data subdivided into several service classifications. For example, traffic data on message telegraph service,

[1] Amendments of Part 43 of the Commission's Rules and Regulations, with respect to the filing by common carriers of periodic statistical reports of their overseas traffic, FCC 64-888 (released October 1, 1964).

private line service and message telephone service are each reported separately for each carrier. Traffic data are also segregated according to whether the communication originated in the United States, terminated in the United States or merely transited the United States. Finally, information is reported separately for each point (country, offshore location, etc.) outside of the continental United States except Alaska, Canada, Saint Pierre-Miquelon and Mexico.[2]

3. On October 16, 1979, the Commission issued a joint Notice of Inquiry and Notice of Proposed Rulemaking (Notice) in the above captioned proceeding soliciting comments involving the possibility of altering the reporting requirements under Section 43.61.[3] The Notice was intended to address several perceived problems with the current reporting procedures. Namely, much of the required data were not useful to the Commission, data reliability was suspect and existing service classifications were not up to date with newer services provided by the international carriers. As a result of these perceived problems, the Notice requested comments on: (a) whether the semiannual reports should be eliminated; (b) whether the current filing due dates should be changed; (c) whether revisions and corrections in the data should be required to increase data reliability; and (d) whether alterations should be made in the scope, type and format of the required data.

4. Comments to the Notice were filed by the American Telephone and Telegraph Company (AT&T), the Hawaiian Telephone Company (Hawaiian), Roger W. Hubbell,[4] ITT World Communications Inc. (ITT), RCA Global Communications, Inc. (RCA), TRT Telecommunications Corporation (TRT), and Western Union International, Inc. (WUI). Reply comments to the Notice were filed by AT&T and ITT. The content of these comments will be addressed in the discussions that follow.

5. In the Notice, we stated that a further notice of proposed rulemaking would subsequently be issued, proposing specific rule changes and inviting interested parties to comment. On August 8, 1984, a Further Notice of Proposed Rulemaking (Further Notice) was adopted by the Commission.[5] Based upon the observations of the Commission from 1979 to 1984 and the comments we had received in 1979, we reached several tentative conclusions. First, the requirement of semiannual reports should be eliminated. Second, the due date for submitting the required annual reports should be changed from May 15 to July 31 for the

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[2] Saint Pierre-Miquelon is a French possession consisting of two small islands off the eastern coast of Canada.

[3] Notice of Inquiry and Proposed Rulemaking, CC Docket No. 79-262, FCC 79-620 (released October 16, 1979), 44 Fed. Reg. 61,214 (October 24, 1979).

[4] Mr. Hubbell is a consultant.

[5] Further Notice of Proposed Rulemaking, CC Docket No. 79-262, FCC 84-393 (released August 14, 1984), 49 Fed. Reg. 35,809 (September 12, 1984).

data covering the previous calendar year. Third, carriers should be required to submit, on October 31, a report revising and correcting any estimates or errors included in the annual report, and no additional revised reports should be required. Fourth, revisions should be made with respect to the reporting of program transmission and private line services. And fifth, the scope of the rule should be broadened to include U.S. traffic to or from Mexico, Saint Pierre-Miquelon and Canada.

6. Comments to the Further Notice have been filed by MCI International, Inc. (MCII), The Western Union Telegraph Company (Western Union), Hawaiian, GTE Sprint Communications Corporation (GTE), ITT, AT&T, RCA and TRT. Reply comments to the Further Notice have been filed by AT&T and Western Union. The content of these comments will be addressed in the discussions that follow.

II. Summary of Decision

7. The international telecommunications industry is an extremely dynamic industry which we must monitor to ensure that our decisions have the desired effects. As technology rapidly advances in this industry, the Commission requires traffic data in order to evaluate applications for international facilities, consider facility planning options, monitor market development and the competitiveness of each service and geographical market in the industry, formulate policies consistent with the public interest and gauge the competitive impact of our decisions on the market. Section 43.61 data are invaluable to the Commission in enabling it to fulfill these objectives as efficiently as possible.

8. However, certain current Section 43.61 reporting requirements provide little assistance to the Commission and, at the same time, substantially burden the carriers. Such requirements have been eliminated by this order. Of the current Section 43.61 requirements that shall remain, many shall be modified. These modifications will best assist us in regulating the international telecommunications industry without unduly burdening the carriers.

9. Specifically, we have decided to amend Section 43.61 in accordance with the tentative conclusions set forth in the Further Notice to eliminate the six-month report and move the filing due date for the annual report from May 15 to July 31. We further decide that carriers will be required to submit a report, on October 31, revising and correcting any figures included in the annual report which have been found by the carriers to be inaccurate by more than five percent. Our experience is that most corrections are relatively minor. Thus, a five percent threshold will avoid a burdensome regulatory requirement while still giving the staff and the public reliable data.[6] We mandate separate reporting for two services-

[6] Of course, if a carrier desires to update or correct even *de minimis* errors it may do so.

audio program transmission and occasional use television transmission and reception — which previously have been lumped together and categorized as "program service." Modified reporting categories for private line services will also be ordered to replace the current manner of reporting such services. These changes will produce usable data on new high speed offerings while reducing reporting burdens on other services. Further, we have streamlined the data required to be reported for transiting traffic.[7] Finally, the scope of the Section 43.61 reports will be narrowed to exclude traffic between the continental United States and offshore U.S. points. Below, issue by issue, we summarize the various filings, analyze the record and reach specific conclusions.

III. Filings and Discussion

A.(1) The Need for the Continuation of Section 43.61 Reports

10. While modifications of Section 43.61 reporting requirements were the focus of both the Notice and the Further Notice, neither document explicitly raised the issue of whether the reports should be eliminated altogether. The issue was first raised by Mr. Hubbell, in his comments to the Notice. Responding to a statement in the Notice that "we seek to remedy the problems discussed ... [in the Notice] as well as other problems that may be brought to our attention,"[8] Mr. Hubbell requested that the Commission consider the need and function of the data required by Section 43.61. He concluded that the Commission is justified in requiring the reports, but only as a source of general data for industry analysis purposes.

11. The issue was raised again by AT&T in its comments to the Further Notice. AT&T analyzed the need and utility to the Commission of the Section 43.61 reports solely in terms of the reports' function in the planning and authorization of international facilities. It concluded, as did Mr. Hubbell, that the Commission's use of these reports for the purpose of international facilities planning is not appropriate. Instead, it suggested that the data provided pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214 (1976), and the facility planning processes established in three regions of the world would furnish a more effective basis upon which to plan facilities. To support this conclusion, AT&T listed several benefits of Section 214 Applications and the facilities planning processes as sources of reliable data including the consideration of "circuit forecasting, circuit engineering, costs, available existing facilities, diversity, redundancy, restoration and economic conditions affecting the

[7] For purposes of Section 43.61, "transiting traffic" generally means "communications which both originate and terminate outside but transit the continental United States or Alaska ..." *See* Appendix, Redesignated paragraph 43.61(a)(17), as amended.

[8] *See supra*, note 3, paragraph 3.

carrier and its correspondents."[9] According to AT&T, the data provided by these alternative means are both historical and prospective, rather than merely historical like the data reported under Section 43.61, and presumably are thus more complete indicators of future traffic patterns.

(2) Discussion

12. Under Section 43.61, data are provided by each carrier for each service on both a global and country-to-country basis, specifying whether the traffic originated or terminated in the United States or merely transited this country. In evaluating new requests for international facilities, the Commission requires data with the scope and detail provided by Section 43.61 reports. Such scope and detail is not always found in the alternative data sources mentioned by AT&T. An equally important advantage of the Section 43.61 reports in assisting the Commission to evaluate requests to construct facilities is the convenient manner in which the data are arranged. Section 43.61 reports collate detailed traffic data in a small number of clear, concise reports, thereby saving some of the Commission's resources that would otherwise be spent piecing together the data included in a plethora of Section 214 applications. Further, the Section 43.61 reporting requirement enables the Commission to acquire the most up-to-date data on international traffic on a regular basis. If the Commission were to depend solely on Section 214 applications and the facilities planning processes, it would often be forced to use antedated traffic data while it awaits the sporadic filing of carrier applications.

13. The Section 43.61 reports are also critical to the Commission's long-term industry analysis efforts. In fact, for this reason alone, Mr. Hubbell concluded that the Commission is justified in requiring the repots. As we usher in an overall policy of enhanced competition in the rapidly developing international telecommunications industry, we require comprehensive, detailed and up-to-date traffic data in order to analyze the success or failure of our policies in the world's various geographical and service markets. If, as time goes on, the data reveal a competitive environment in one or more markets, the Commission would be able to increasingly deregulate the industry. Section 43.61 reports are invaluable to the Commission in order for it to accomplish this objective wisely.[10]

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[9] Comments of American Telephone and Telegraph Company, p.5, note **, received September 24, 1984.

[10] In addition to having questioned the utility to the Commission of the Section 43.61 reports, AT&T also questioned whether the government is soliciting information in these reports which ought to be treated as proprietary. Arguing that the disclosure of revenue and traffic data on a country-by-country basis enables each carrier to utilize the economic data of its competitors for its own marketing information, AT&T concluded that it is forced to suffer competitive harm as a result. It urged that at least some of the information currently required by Section 43.61 should therefore be deemed proprietary and not be subject to filing requirements.

14. Thus, for various reasons, Section 43.61 reports assist the Commission in furthering the public interest. We affirm the need for the continuation of these reports.

B. (1) The Semi-Annual Report

15. In the Notice, we stated that we are considering the elimination of the semi-annual reporting requirement of Section 43.61. We solicited comments to ascertain whether the public interest benefits obtained from the continued requirement of a semi-annual report outweighed the burden that the requirement imposes upon the carriers and the Commission staff.

16. In response to the Notice ITT, RCA, TRT and WUI advocated the retention of the semiannual reporting requirement. All expressed views that the semiannual data provide a useful management tool, allowing a carrier to make more informed business choices. ITT also argued that the data would enhance the Commission's ability to regulate based upon current information rather than speculation. ITT added that the continuation of this half-year reporting requirement would not substantially burden the Commission, since we already possess the necessary computer programs to efficiently process the data. AT&T, Hawaiian and Mr. Hubbell, on the other hand, urged that the semiannual report requirement be eliminated. AT&T and Hawaiian questioned the accuracy of the semiannual reports due to the inability of the carriers to gather the actual traffic data by the time that semiannual report must be filed. Hawaiian also stated that the elimination of the reporting requirement would save considerable resources for both the carriers and the Commission.

17. In the Further Notice, we tentatively concluded that Section 43.61's semiannual reporting requirement should be eliminated. We found semiannual reports to be of little use to the Commission and not otherwise necessary to satisfy the private business requirements of the carriers.

18. In response to the Further Notice, AT&T, Hawaiian, GTE and RCA explicitly endorsed our tentative conclusion, RCA reversing its position taken in response to the Notice. However, TRT and ITT, in

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Though this argument was offered by AT&T to challenge the filing requirements of the rule, AT&T has not demonstrated that the filing of this information will cause competitive harm. Any harm which could occur would be caused by the disclosure of the data to AT&T's competitors rather than from the Commission's gathering of the information for its own regulatory purposes. If AT&T or any other carrier believes that disclosure of specific information which it submits pursuant to Section 43.61 could harm it competitively, it should request confidential treatment at the time the information is filed. We have no basis for deciding at this time that future filings pursuant to Section 43.61 will warrant confidential treatment although we do remind carriers that a specific request for confidential treatment should be supported by a clear and convincing argument concerning direct competitive harm.

support of the semiannual reporting requirement, argued that the requirement aids the Commission as well as the carriers by providing the most up-to-date data possible on the industry. TRT added that currently available traffic data would greatly assist small and new carriers in their endeavors to obtain operating agreements with foreign administrations. It envisioned the scenario where a prospective carrier can obtain an agreement by using Section 43.61 data to demonstrate its strong growth potential. Both ITT and TRT concluded that to the extent that current information is made available, both the carriers and the Commission will be better able to monitor and respond to overall market trends.

(2) Discussion

19. The comments opposing our tentative conclusion have not persuaded us that the semiannual reports are necessary for our regulatory needs or are otherwise mandated by the public interest. To begin with, the Commission is essentially engaged in evaluating long-term facilities needs and industry trends and would not be substantially assisted by semiannual reports which record, at most, short-term variations in traffic activity. Further, a substantial proportion of the data included in a six-month report is based on estimates, thereby calling into question the report's reliability.

20. Though the individual carriers may be able to use Section 43.61 semiannual data for their own business purposes, adequate substitutes are available elsewhere. For example, carriers obtain data every month from which they bill their customers. Further data can be obtained by consulting the annual Section 43.61 reports and other reports on file with the Commission. To the extent that the carriers need more frequent or timely reports, it is their responsibility to generate them internally. Helping carriers make business decisions is not a valid reason for requiring them to report to the Commission. As to TRT's statement that the semiannual reports would assist small and new carriers obtain operating agreements, the statement is entirely unsupported. We see no logic to the argument that semiannual reports would have any more impact than annual reports for this purpose.

21. Eliminating the six-month report requirement will therefore have no significant negative impact on our ability to analyze applications, participate in the facilities planning processes or monitor the industry. Elimination of this reporting requirement would save the Commission and the carriers substantial resources. Accordingly, we will amend Section 43.61 to eliminate the requirement of a semiannual report.

C. (1) The Due Date for Filing the Annual Report

22. In the Notice, we announced that we were considering a change in the due date for filing the annual Section 43.61 reports. The rule presently

requires the annual reports to be filed by May 15 for the traffic data of the preceding calendar year. Delays in obtaining adequate data from the carriers' foreign correspondents and in processing this data caused us to question whether retaining the present May 15 due date would require the carriers to include an excessive number of estimates in their reports, thereby undermining the accuracy of the reported data. Comments were solicited concerning the extent to which actual data are available at particular dates in order to determine the need for extending the filing date.

23. In response to the Notice the commenters submitted information on the proportion of the data that was estimated and the accuracy of these estimates. All carriers reported some need to estimate, but the proportion of estimates was significantly higher for AT&T than for the international record carriers. For example, whereas AT&T stated that approximately one half of its incoming phone data were estimated,[11] TRT stated that the proportion of estimates for its telex service was merely twelve percent.[12] Only three parties specifically addressed the question of whether to extend the due date for filing the annual reports. TRT opposed such an extension, contending that the need for currency in the reports outweighs the desirability of eliminating those small inaccuracies in the data which accompany an early due date. AT&T and Mr. Hubbell however, argued that the need for accuracy in the reports, in light of the significant proportion of estimates in the present data, necessitates that the due date be extended. AT&T suggested September 1 as the proper due date; Mr. Hubbell suggested September 31.

24. In the Further Notice, we attempted to balance the desire for fresh and usable data and the need for minimizing the number of revised or corrected reports. We tentatively concluded that the filing due date for the annual reports should be moved to July 31. None of the carriers offered any opposition to this proposal, and Hawaiian, GTE, AT&T and RCA explicitly endorsed it.

(2) Discussion

25. If we were to continue to require the reports to be filed by May 15, the time lag would force the need for estimation and, as a result, the accuracy of these reports could always be subject to question. Further, the integrity of the reporting rules would be undermined, as was indicated by the fact that five out of the ten carriers that filed their 1983 annual reports, faced with a May 15 deadline, did not submit their reports by June 15. On the other hand, were we to extend the due date to September, as AT&T and Mr. Hubbell originally suggested, the accuracy of these

[11] Comments of American Telephone and Telegraph Company, p. 6.
[12] Comments of TRT Telecommunications Company, p. 4.

reports would improve but the data we would obtain would not be nearly as current.

26. We think that imposing a due date of July 31 would best balance the above considerations. In our view, this is the earliest time of the year that the carriers could acquire and process enough of the actual data to create acceptably accurate reports. We therefore will amend Section 43.61 to alter the due date for filing annual reports from May 15 to July 31.

D. (1) Updating Errors and Estimates in the Annual Report

27. Presently, Section 43.61 does not require carriers to revise or correct any estimates or errors in their annual reports.[13] As a result, the reliability of the reported data is subject to question. To address this problem, we stated in the Notice that we were considering requiring each carrier to submit a revised Section 43.61 annual report by December 31. This report would be a complete report, including all of the latest available data for each service and country. We also announced that we were considering supplementing this revised report with a requirement that "substantial" errors subsequently discovered be reported as well. We requested comments on appropriate standards for defining "substantial" errors for each service and country reported. An example of possible substantiality thresholds for telephone service was provided.[14] These thresholds were based on a graduated standard for each country: the smaller the amount of revenue derived from a country, the larger the percentage of error which would trigger the filing requirement.

28. The conclusions of those who submitted comments to the Notice varied. All who addressed the issue recommended some form of require-

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[13] Estimates and errors are now corrected by the carriers on a voluntary basis. The uncertainty as to who will file what data, and when, diminishes the usefulness of this process.

[14] The following substantiality thresholds were suggested for telephone service:

1. For countries with more than 10 million minutes or $10 million in revenues (excluding foreign payouts) or more than 1 million calls, an error that exceeds 1% of the figure in any category would require a report for all data of the country.
2. For countries with more than 5 million but less than 10 million minutes or dollars of revenue (excluding foreign payouts) or more than 500,000 but less than 1 million calls, an error that exceeds 2% of the figure in any category would require a report for all data of the country.
3. For countries with more than 1 million but less than 5 million minutes or dollars of revenue (excluding foreign payouts) or more than 100,000 but less than 500,000 calls, an error that exceeds 3% of the figure in any category would require a report for all data of the country.
4. For countries with less than 1 million minutes or dollars of revenue (excluding foreign payouts) or less than 100,000 calls, an error that exceeds 4% of the figure in any category would require a report for all data of the country.

ment for the reporting of revisions, but there was little agreement as to how many revisions should be required or what criteria should be used, if any, to ferret out those errors of sufficient substantiality to warrant revisions.

29. In the Further Notice, we tentatively concluded that requiring carriers to update all reported data in a complete, revised report would be unduly burdensome to the carriers. Also we tentatively concluded that Section 43.61 data would substantially increase in reliability if corrections were submitted at least once. We specifically proposed a one-time submission, on October 31, of any inaccuracies contained in the annual report, in order to ensure the reliability of the Section 43.61 data without unduly burdening the carriers.

30. GTE and RCA explicitly endorsed the Commission's proposal in their comments to the Further Notice. Hawaiian and MCII, however, presented alternative proposals. Hawaiian suggested that there is no need to require filing any revised report, particularly not in October, only three months after the proposed annual report filing due date. Moving this due date from May 15 to July 31, should so greatly curtail the extent of inaccuracy in the annual report, it argued, that the remaining need for revisions could not justify imposing the substantial burden on the carriers that would result from requiring the submission of a revised report. Should the submission of revisions be required, Hawaiian added, then the Commission should require the reporting of only those inaccuracies measuring at least five percent of the traffic or revenue figure in the annual report. MCII, noting that our proposal did not have a substantiality threshold, stated that under the proposed requirement, the resubmission of data would be required for the vast majority of overseas points and, as a result, little or no reduction of reporting burdens would be achieved. MCII did not propose that we omit a revision requirement altogether, however. Instead, it suggested employing a threshold factor of $10,000, such that only those inaccuracies in the annual report greater than this figure would trigger a requirement that carriers report revisions. According to MCII, employing a $10,000 threshold would enable the Commission to substantially increase the reliability of the Section 43.61 reports without unduly burdening the carriers by requiring them to remedy a large number of minor errors.

(2) Discussion

31. Upon consideration of the issue presented here, we conclude that our proposal in the Further Notice could place undue reporting burdens on the carriers. Though the need for reliability of the data submitted in the annual reports compels us to require carriers to submit revisions of substantial inaccuracies, we agree with MCII and Hawaiian that there is

no need to require submissions of *all* inaccuracies, many of which would be minor. Our efforts in reviewing requests for facilities, in facilities planning and in industry monitoring will not be impaired by the use of data which are inaccurate by merely a few percentage points. In balancing our need for precise data with the desire not to unduly burden carriers, we have decided that inaccuracies up to five percent would be tolerable. Hence, we shall amend Section 43.61 to require carriers to submit revisions of inaccuracies exceeding five percent of the figure included in the annual report, for each service, country and measurement unit (e.g. minutes, words, revenues, messages, etc.) reported.[15]

32. In order to ease the reporting burden on the carriers, we shall require that these inaccuracies need be corrected only in a one-time submission, on October 31. We choose October 31 as the due date for filing revisions in order to give the carriers three full months to double check the data included in the annual report and to acquire from foreign correspondents any relevant updates and corrections of such data.

E. (1) Revision of the Scope, Type and Format of Section 43.61 Data

33. The final set of issues discussed in the Notice and Further Notice involve how best to structure the scope, type and format of Section 43.61 data in light of the recent developments in international telecommunications and the Commission's experience in examining the usefulness of the data. In the Notice, we requested commenters to identify and provide information on those categories of actual and potential services that are not currently identified and reported separately. We requested suggestions specifying the appropriate measurement units that the carriers should use to report each service. We also solicited comments on whether the data should be reported by tariff classification or by broad generic category and whether data should be reported in a hand written form or in a computer readable format. We further requested commenters to discuss whether a need remains for the continued submission of data involving transiting traffic and traffic between the continental United States (CONUS) and offshore U.S. points.

34. Several new services were identified in the comments to the Notice, though no commenter attempted to demonstrate that any such service had generated a substantial amount of revenue. AT&T discussed two prospective services — international Dataphone and international WATS — and concluded that separate reporting requirements for these services would not yet be appropriate. TRT cited "packet switching" as a new service currently being offered yet not reported as a separate service under Section 43.61. In order to ease the reporting burden on the carriers,

[15] Carriers who believe that the five percent criterion would be unduly burdensome or would cause hardship may seek waivers for specific situations.

ITT proposed that a service must generate one million dollars in total annual industry revenues before we require separate reporting of the service. Mr. Hubbell recommended the addition of an "All other" category as a repository for minor services, so that all data on international traffic are included.

35. With respect to the appropriate measurement units for reporting services, AT&T advocated the deletion of any requirement that data be submitted on numbers of messages for each service. WU suggested that whenever more than one carrier supplies a particular service, the industry should meet to develop the appropriate measurement units. WU also proposed an industry meeting to address updating the list of countries which serves as the basis for the assignment of traffic to specific points and to consider the form of the existing market analysis as prepared by the Commission.

36. The carriers were divided in their assessment of whether the data should be reported by tariff classification or by broad generic category (e.g., telex, message telephone service, leased channels). WU summarily endorsed the former alternative, as did RCA in the context of certain developing services. Mr. Hubbell, on the contrary, argued that the only practical alternative is to report data in broad generic categories established by the Commission. Finally, with respect to the proper format of Section 43.61 submissions, RCA suggested that the data be submitted in the form of magnetic computer tape, since the elimination of punch cards would substantially reduce the submission work effort.

37. A number of comments to the Notice analyzed the proper scope of the Section 43.61 data. At least with respect to message telephone service, Mr. Hubbell argued that traffic linking the CONUS with overseas American points should be integrated into the domestic pattern and removed from the requirements of Section 43.61. Should the Commission decide to include such traffic under Section 43.61, Mr. Hubbell added, then consistency would dictate that the Commission require submissions on Alaskan traffic as well. AT&T addressed these same reporting requirements and similarly concluded that they should be deleted, as they do not assist the Commission in planning international facilities. WU advocated continuing to require international record carriers to report data on traffic between the CONUS and American offshore points involved in rate integration. Both ITT and Mr. Hubbell urged the Commission to broaden Section 43.61's scope to encompass U.S. international traffic to or from Mexico, Canada and Saint Pierre-Miquelon. Mr. Hubbell considered such information helpful in order for the Commission to conduct industry analyses. Finally, WU, AT&T and Mr. Hubbell all urged the continuation of reporting requirements for transiting traffic, though the latter two

recommended requiring the information on a less detailed basis in order to ease the reporting burden on the carriers.

38. In the Further Notice, the Commission reached several tentative conclusions as to the scope, type and format of the required data. We tentatively concluded that changes in the reporting requirements are needed to clarify and simplify the information reported in certain categories. First, we found "program service" to be an ambiguous category for which aggregate data are not useful, particularly in view of significant traffic growth. In order to clarify the information received, we proposed that Section 43.61 should be modified to specify that audio program transmission service, on the one hand, and occasional use television transmission and reception services, on the other, should be reported separately. Second, we tentatively concluded that the requirements pertaining to the information filed for leased channels should be modified to assure that newly developed, high speed leased channel services are adequately reported, to ease the reporting burden on the carriers by decreasing the number of transmission rate categories reported and to simplify the Commission's task in interpreting the data by making the specification of transmission rates more uniform. In order to achieve the above goals, we tentatively concluded that a group of eight reporting categories for leased channel services should be employed, in lieu of current requirements. Third, with respect to the scope of Section 43.61, we tentatively concluded that Section 43.61 should be modified to require carriers to submit data for U.S. traffic to or from Mexico, Canada and Saint Pierre-Miquelon. We found such data vital to the Commission to properly analyze the international market, as our monitoring efforts become more sophisticated and as more carriers apply to provide service to these points. We did not propose the elimination of the requirement to report data for offshore U.S. points (Puerto Rico, Hawaii, etc.), for such data were found helpful to the Commission's efforts in the planning and authorization of international facilities.

39. The comments to the Further Notice revealed that the carriers generally supported our tentative conclusions on the scope, type and format of the Section 43.61 data. TRT, RCA, MCI, GTE and Hawaiian raised no objections to these tentative conclusions in their comments. Western Union generally endorsed these proposals as well, though it added that it would be technically impossible, at the present time, for it to separate out Telex I traffic between the CONUS and foreign points on the North American continent from its intra-CONUS Telex I traffic.

40. The two carriers which were dissatisfied with the proposals were AT&T and ITT. AT&T suggested that if the Commission continues to require Section 43.61 reports to be filed, the competitive harm AT&T would suffer from the disclosure of data would be minimized if Section

43.61 were at least amended to require the reporting of data on an aggregate basis by world regions (e.g., Europe, Central America, South America, etc.) rather than on a country-by-country basis. AT&T also reiterated its comments to the Notice urging that data regarding traffic between the CONUS and offshore U.S. points are not necessary to the Commission and should not be required. AT&T further found no warrant in broadening the scope of Section 43.61 to include traffic between the CONUS and foreign points on the North American continent.

41. ITT urged the Commission to require information concerning the operations of the international resale carriers. ITT also suggested that the Commission should obtain data on the domestic, as well as the international links for tariffed and non-tariffed record services, in order to monitor the competitiveness of the record services' markets. In its Reply comments, Western Union responded that ITT's latter suggestion exceeded the scope of this proceeding, which solely addresses the Commission's need to obtain information on international common carrier communication services.

(2) Discussion

(i) Services to Be Reported and the Proper Manner of Reporting Them

42. Of the new services mentioned in the comments, AT&T's international Dataphone service and various packet switching services provided on a common carrier basis stand out as services that may have already generated a non-trivial amount of international traffic for which there are no separate reporting requirements. Nevertheless, the traffic levels for packet switching services are not yet substantial and Dataphone is now reported within the switched voice category (IMTS). Therefore, we see no need, at this time, to require the reporting of either Dataphone or common carrier packet switching as separate service categories. Instead, we shall, as necessary, contact AT&T and the major packet switching common carriers in order to gauge the size of their international market. We shall, if needed, solicit data on these common carrier services in particular future proceedings. In the interim, the reporting of traffic provided via packet switching or other services newly offered or not specifically falling within a particular filing category shall be governed by the miscellaneous filing requirement of Section 43.61(g), now redesignated.[16]

43. Upon examination of the comments to the Notice and Further Notice and our own analysis of the information filed pursuant to Section 43.61, we shall order several changes in the categories used for differentiating services and for measuring data for these services. Program

[16] We shall clarify this section to establish it as an "all other" provision as suggested by Mr. Hubbell. By so doing, total market figures can be calculated.

transmission service is an ambiguous category for which aggregate data are not useful to the Commission, particularly in light of significant traffic growth. AT&T's report specifically indicates that it combines audio program service with occasional use television transmission and reception services. RCA and ITT do not indicate whether occasional use television transmission and reception services are included in their report of program transmission service. A number of carriers report no traffic under this service category. In order to clarify the information received, we shall amend Section 43.61 to specify that audio program transmission service and occasional use television transmission and reception services be reported separately. We note that this modification does not impose any new filing requirement but merely seeks to change the manner in which the data are filed so that we may more effectively monitor the growing international video market.

44. We also have concluded that the requirements pertaining to the information filed for leased channels shall be amended to reduce the burden on the carriers by eliminating unnecessary detail and to provide the necessary information in a more useful form. Currently, the data on leased channels are not reported in the same manner by all carriers. The carriers report leased channels by transmission speeds using a variety of measures such as words-per-minute, bauds and, in the case of one carrier, bits-per-second. The carriers also report the uses to which the customers put the channels they lease as is required by the existing rule.

45. The fact that leased channels are being provided in a widening range of transmission speeds and increasing use of digital transmission technology in providing leased channels will increase the already large number of individual items of information the carriers will have to report under the current rules and may further complicate the reporting of transmission speeds. We have concluded that the leased channel information filed by the carriers can be made more useful to us and the carriers' burden in filing that information can be substantially reduced by amending our rules to require that all leased channels be classified into four categories by transmission speed and reported in that manner. The four categories of leased channels to be reported are as follows:

Leased channels with transmission speeds of

a. Up to 1200 bits;

b. over 1200 bits and up to 9600 bits;

c. over 9600 bits and up to 30 megabits/18 megahertz; and

d. over 30 megabits/18 megahertz and up to 120 megabits/72 megahertz.

These four categories correspond approximately to leased channels of less than voice circuit capacity, leased channels of voice circuit capacity,

medium to high speed data transmission channels and leased satellite transponders or fractional transponders.

46. Under the amended rule, only the number of leased channels in each of these four categories will have to be reported. Thus, it will no longer be necessary for carriers to report leased channels of each discrete transmission speed individually. To further reduce the burden of complying with this rule, we shall also eliminate the requirement that carriers report the uses to which customers put leased channels. This action will further reduce the number of individual entries the carriers must include in their reports. Use of a single measure for transmission speed of the leased channels will both simplify reporting by the carriers and make the information more useful.[17]

47. Further, after analyzing the need to require the carriers to submit revenue data, we have decided to continue to require such data to be reported. These data will be needed to perform economic analyses in connection with various proceedings and to evaluate the industry's development towards a competitive market. In particular, revenue data will be needed to compute market shares, concentration ratios, and growth trends in different markets. Traffic data, while useful for other purposes, cannot be used to compute these kinds of statistics.

48. The commenters have proposed several additional changes to the reporting requirements of Section 43.61 which we have decided not to implement for the present time. First, one such proposal advocated the deletion of the requirement that the carriers report numbers of messages. No evidence was provided which suggests that this requirement is particularly burdensome to the carriers. Since the Commission has found the data on number of messages to comprise a useful tool in monitoring industry trends, the requirement will not be deleted at this time. Second, it was recommended that the data be submitted in the form of magnetic computer tape rather than punch cards. Currently, we are endeavoring to coordinate the formats of several types of documents reported to the Commission. We may not change the format in which the carriers must file reports until after this coordination effort is complete. Nevertheless, we do recognize that the continued use of punch cards may not be the best long-term solution. We will therefore delegate to the staff authority to revise the format to use more modern computer processing alternatives or, if it is more efficient, to use hard copy reports in a standard format.[18] Third, we see no need for industry meetings to address the requirements of Section 43.61. Such industry meetings would be a burden on both our own and the carriers' resources without providing proportionate benefits

[17] For category c., the carriers may use either megabits per second or megahertz of transponder bandwidth to define the reporting category.

[18] We shall also delegate to the staff authority to revise the Section 43.61 filing manual.

to the carriers or the Commission. We may in the future consider less burdensome, informal alternatives to industry meetings in order to obtain the necessary carrier input for reporting Section 43.61 data. Fourth, we will continue to differentiate services according to broad generic categories, despite the comments to the effect that tariff classifications should form the basis of service differentiation. We believe that service differentiation by tariff classification would require overly detailed service breakdowns, significantly burdening the carriers without offering any additional benefits to the Commission. Such classifications also may vary over time, thereby reducing the ease by which the Commission can meaningfully compare data on the same service for different points in time. Finally, we believe that effective monitoring and analysis requires the filing of data on a country-by-country basis rather than region-by-region. Country-by-country data are crucial to the Commission's effort in identifying and analyzing discrete geographical markets in order to analyze the international telecommunications industry. The detail provided by the reporting of data for every country will also support the Commission's efforts in facilities planning and requests for facilities authorizations. AT&T's challenge to this requirement was based on the premise that the reporting and public disclosure of data on a country-by-country basis would place AT&T at a competitive disadvantage. However, no evidence was provided to substantiate this claim, see *supra*, note 4.

(ii) The Scope of Section 43.61

49. Section 43.61 currently requires carriers to file reports on traffic between the CONUS and "overseas points."[19] Overseas points are quite literally defined in Section 43.61(a)(9) to include all overseas territories or possessions of U.S. as well as the State of Hawaii, but to exclude Alaska, Canada, Mexico and Saint Pierre-Miquelon, all of which are considered parts of the North American continent. Section 43.61 shall be amended to exclude traffic between the CONUS and off-shore domestic points. Section 43.61 shall not be amended to include traffic between the CONUS and foreign points on the North American continent (i.e. Canada, Mexico and Saint Pierre-Miquelon).

50. Information on traffic between the CONUS and certain off-shore domestic points is utilized by the Commission in analyzing international facilities proposals, since one facility may carry both domestic and international traffic. However, the information provided by the carriers to the Commission in international facilities planning dockets is adequate in this regard. With respect to international, intra-North American traffic, the scope of Section 43.61 will not be broadened to include such traffic. Due to the integration of the foreign North American points with the U.S.

[19] See 47 C.F.R. 43.61(b).

domestic network, broadening the scope of Section 43.61 to include intra-North American traffic would not assist the Commission in evaluating international facilities proposals. Further, from an operational and engineering point of view, these points are so integrated with the domestic network as to possibly render unduly burdensome any requirement that the carriers file data on traffic between these points and the United States. For example, in its comments to the Further Notice, Western Union stated that it would be technically impossible, at the present time, for it to separate out Telex I traffic between the CONUS and foreign points on the North American continent from its intra-CONUS Telex I traffic.

51. All interested parties agreed that the Commission should continue to require the reporting of data on "transiting traffic," see *supra*, note 6. However, two commenters questioned the detail in which we currently require the carriers to report such traffic. Specifically questioned was the efficacy of requiring breakdowns on number of messages, gross carrier revenues and whether such traffic is inbound or outbound. In view of these comments and the Commission's experience in utilizing transiting traffic data, much of the data required has significantly burdened the carriers without providing proportionate benefits to the Commission. We shall amend Section 43.61 to eliminate the requirement that carriers report the number of messages of transiting traffic for various services. We shall also amend Section 43.61 to require that carriers simply report transiting traffic by the country which originated the traffic instead of requiring carriers to categorize transiting traffic as inbound and outbound and to aggregate all inbound (terminating and transiting) and outbound (originating and transiting) traffic, respectively.

52. We also conclude that the carriers shall not be required to report, pursuant to Section 43.61, data on the domestic, non-overseas links for tariffed and non-tariffed record service traffic, as was suggested by ITT. Such data would not assist the Commission either in monitoring the international industry or in planning international facilities. Any other benefits which may accrue from accumulating such data are extraneous to the purpose of Section 43.61 and the goals of this proceeding.

53. Finally, in response to the suggestion that international resellers should be required to file Section 43.61 reports, we note that international resale common carriers are already required to file reports.

54. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96-354), IT IS CERTIFIED that Sections 603 and 604 of the Act do not apply because these rule changes will not, if promulgated, have a significant economic impact on a substantial number of small entities. See 5 U.S.C. Sections 603, 604, 605(b). Instead, the rule changes will affect

only entities large enough to invest the substantial amount of capital necessary to compete in the international telecommunications industry.

55. The order contained herein has been analyzed with respect to the Paperwork Reduction Act, 44 U.S.C. 3504 (h) (3) (1980), and found to impose new or modified requirements or burden upon the public. Implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

56. Accordingly, it is ORDERED, pursuant to Sections 4(i), 4(j), 219, 220(a), 303(r), 403 and 404 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 219, 220(a), 303(r), 403 and 404 (1970), that the policies and rules set forth herein ARE ADOPTED as a final decision in CC Docket No. 79-262.

57. IT IS FURTHER ORDERED that Section 43.61 of the Commission's Rules and Regulations IS HEREBY AMENDED, effective 30 days after publication of this Report and Order in the Federal Register, as reflected in the Appendix. Although effective 30 days after publication in the Federal Register, these amendments shall not apply to any Section 43.61 reports covering calendar-year 1984 traffic. 1984 traffic data shall be filed under the pre-existing rules.

58. IT IS FURTHER ORDERED that CC Docket No. 79-262 is hereby TERMINATED.

59. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this order to be published in the Federal Register and shall mail a copy of this Report and Order to the Chief for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

Proposed Rules

It is ordered that Part 43 of the Commission's Rules, 47 C.F.R. Part 43 is amended as follows:

1. Paragraph 43.61 (a)(1) is revised to read:

§43.61 Reports of overseas telecommunications traffic

(a) * * *

(1) "Telecommunications service between the continental United States and overseas points" means the transmission or reception of communications by cable or radio (i) which originate or terminate at points within the area comprising the continental United States and Alaska and terminate or originate at points located outside the area comprising the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico and off-shore U.S. points, and (ii) which both originate and terminate outside but transit the continental United

States or Alaska, except communications both originating and terminating at points located in the aforementioned area."

* * * * *

2. Paragraph 43.61 (a)(9) is revised to read:

(a) * * *

(9) "Overseas point" means: (i) For reports required by paragraph (b) of this section, any country or point located outside the area comprising the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico and off-shore U.S. points; and (ii) for reports required by paragraph (c) of this section, all points outside the particular state, territory, or possession for which a report is required.

* * * * *

3. Paragraph 43.61(a)(12) is revised to read:

(a) * * *

(12) "Paid traffic handled" means all communications for which charges are collected and which are actually handled over facilities operated by the respondent out of or into the continental United States or Alaska.

* * * * *

4. Paragraph 43.61 (a)(14) is revised to read:

(a) * * *

(14) "Program service" means the transmission and reception of audio program material for delivery to a broadcasting station for broadcasting to the public, or the monitoring of programs broadcast abroad, for which a charge is made on a time basis.

* * * * *

5. Paragraph 43.61(a) (15) is revised to read:

(a) * * *

(15) "Revenues accruing to respondent" means the revenues from the overseas haul, consisting of total charges paid by the public for the particular service after deduction of such portions thereof as are applicable to terminal handling in the continental United States or Alaska and, where connecting or other carriers perform a part of the service, such portion paid to or retained by such connecting or other carriers: *However*, For telephone message and overseas teleprinter exchange services, revenues accruing to respondent mean the total revenues paid by the public for such services after deduction only of that portion of total revenues paid to or retained by connecting or other carriers which perform part of the service outside the continental United States or Alaska.

* * * * *

6. Paragraphs 43.61(a) (16) and (17) are redesignated paragraphs 43.61(a) (17) and (18), respectively.

7. Paragraph 43.61 (a)(16) is revised to read:

(a) * * *

(16) "Occasional use television transmission and reception service" means the transmission or reception of television signals for which a charge is made on a time basis.

* * * * *

8. Redesignated paragraph 43.61(a)(17) is revised to read:

(a) * * *

(17) "Transiting traffic" means: (i) For reports required by paragraph (b) of this section, communications which both originate and terminate outside but transit the continental United States or Alaska except communications both originating and terminating in the area comprising Canada, Saint Pierre-Miquelon, Mexico and off-shore U.S. points; and (ii) for reports required by paragraph (c) of this section, communications which originate and terminate outside but transit the particular state, territory, or possession for which a report is required.

* * * * *

9. Paragraphs 43.61 (b) and (c) are revised to read:

(b) Each common carrier engaged in furnishing telecommunications service between the continental United States or Alaska, and overseas points shall file with the Commission a report in triplicate with respect to such overseas telecommunications, not later than July 31 of each year for the preceding period of January through December, as provided hereafter in this section.

* * * * *

(c) Each common carrier engaged in furnishing telecommunications service between a United States point outside the continental United States and Alaska, and overseas points shall file with the Commission a report in triplicate with respect to such overseas telecommunications not later than July 31 of each year for the preceding period of January through December. This report shall contain the information required by paragraphs (e) (1) (ii), (2) (ii), (3) (ii), and (8) of this section, excluding leased channel service with the continental United States or Alaska. In applying such paragraphs and definitions contained in paragraph (a) of this section, the state, territory, or possession for which the report is made should be substituted for the words, "continental United States or Alaska"; where applicable.

* * * * *

10. Paragraph 43.61 (d) is redesignated paragraph 43.61(e).

11. Paragraph 43.61(d) is added to read:

(d) Each reporting carrier shall submit a revised report by October 31 identifying and correcting any inaccuracies set forth in the annual report exceeding five percent of the reported figure.

* * * * *

12. Paragraphs 43.61(e), (e)(1)-(6) are redesignated paragraphs 43.61(f), (f) (1)-(6). Paragraph 43.61(f) is redesignated paragraph 43.61(g).

13. Redesignated paragraph 43.61(f) is revised to read:

(f) The reports required by this section shall show, where applicable, the following information, separately, for outbound traffic, inbound traffic and traffic which transits the continental United States or Alaska; information totals for transiting traffic shall be reported according to the country originating the message: *Provided, however*, that the provisions with respect to the showing of transiting traffic shall not apply to subparagraphs (1) (ii), (2) (ii) and (3) (ii) of this paragraph; *Provided, also*, that for each service reported, the number of messages need not be reported for transiting traffic.

* * * * *

14. Redesignated paragraph 43.61(f)(1) is revised to read:

(f) * * *

(1) For message telegraph service:

(i) The number of messages and chargeable words of all classes of paid traffic combined handled with each overseas point of destination or origin, and the corresponding revenues accruing to the respondent; and for outbound traffic, the amounts of payouts to connecting carriers, other than for terminal handling in the continental United States or Alaska shall also be shown;

* * * * *

15. Redesignated paragraph 43.61(f)(2) is revised to read:

(f) * * *

(2) For message telephone service:

(i) The number of messages and chargeable minutes of all classes of paid traffic combined handled with each overseas point of destination or origin, and the corresponding revenues accruing to the respondent; and for outbound traffic, the amounts of payouts to connecting carriers, other than for terminal handling in the continental United States or Alaska, shall also be shown;

* * * * *

16. Redesignated paragraph 43.61(f)(3) is revised to read:

(f) * * *

(3) For overseas teleprinter exchange service:

(i) The number of messages and chargeable minutes of all paid traffic handled with each overseas point of destination or origin, and the corresponding revenues accruing to the respondent; and for outbound traffic, the amount of payouts to connecting carriers, other than for terminal handling in the continental United States or Alaska, shall also be shown;

* * * * *

17. Redesignated paragraph 43.61(f)(4) is revised to read:

(f) * * *

(4) For facsimile, cablephoto, and radiophoto services:

(i) The number of messages of all paid traffic handled with each overseas point of destination or origin, and the corresponding revenues accruing to the respondent; and for outbound traffic, the amounts of payouts to connecting carriers, other than for terminal handling in the continental United States or Alaska, shall also be shown.

* * * * *

18. Redesignated paragraph 43.61(f) (6) is revised to read:

(f) * * *

(6) For program service:

(i) The number of chargeable minutes of all paid program service handled with each overseas point of destination or origin, and the corresponding revenues accruing to the respondent; and for outbound traffic, the amounts of payouts to connecting carriers other than for terminal handling in the continental United States or Alaska, shall also be shown.

* * * * *

19. Paragraphs 43.61(e) (7), (8) and (9) are redesignated paragraphs 43.61(f) (8), (9) and (10), respectively.

20. Paragraph 43.61(f)(7) is added to read:

(f) * * *

(7) For occasional use television transmission and reception services:

(i) The number of chargeable minutes of all paid service handled with each overseas point of destination or origin, and the corresponding revenues accruing to the respondent; and, for outbound traffic, the amounts of payouts to connecting carriers, other than for terminal handling within the continental United States or Alaska, shall also be shown.

* * * * *

21. Redesignated paragraph 43.61(f)(8) is revised to read:

(f) * * *

(8) For addressed press service:

(i) The number of chargeable minutes of all paid addressed press service transmitted from or received in the continental United States or Alaska separately, and the corresponding revenues accruing to the respondent.

* * * * *

22. Redesignated paragraph 43.61(f)(9)(ii) is revised to read:

(f) * * *

(9) * * *

(i) * * *

(ii) (a) The number of leases in effect on the last day of the period covered in the report with (1) United States Government agencies, (2) foreign governments, (3) press entities, and (4) other users, separately for cable and radio operations between the continental United States or Alaska and each overseas point; (b) For each type of user, the number of leases shall be further reported as to:

(1) the number of each channel provided in each of the following ranges of transmission speeds:

(a) Up to 1200 bits

(b) over 1200 bits and up to 9600 bits

(c) over 9600 bits and up to 30 megabits/18 megahertz

(d) over 30 megabits/18 megahertz and up to 120 megabits/72 megahertz;

(2) service furnished for "Full Period" (twenty-four hours per day) and for each "Short Period" (less than twenty-four hours per day).

* * * * *

23. Redesignated paragraph 43.61(f) (10) is revised to read:

(f) * * *

(10) Total amount collected from users in the continental United States or Alaska for overseas telecommunications services:

(i) The total amount collected by the respondent directly from users in the continental United States or Alaska, showing (a) receipts from message telegraph service, (b) receipts from message telephone service, (c) receipts from overseas teleprinter exchange services, (d) receipts from leased channel services, (e) receipts from other telegraph services and (f) receipts from other telephone services.

* * * * *

24. Redesignated paragraph 43.61(g) is revised to read:

(g) This section shall apply, where applicable, to any overseas telecommunications service which is not separately identified in paragraph (f) of this section. The carriers shall list the names of such services and aggregate all revenues obtained from providing these services.

* * * * *

Contour, Measurements
Television, Low Power

The Commission does not consider terrain shadowing studies in its evaluation of low power television and television translator applications, since there is no universally accepted method of predicting the effects of terrain shielding. The Commission will not grant waivers of its policy not to consider terrain shielding based on promises by parties to resolve future interference.
—*Apogee B/cing Corp.*

FCC 85-113

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
Apogee Broadcasting Corporation	
For a Construction Permit for a New Low Power Television Station on Channel 52 Fort Collins, Colorado	File No. BPTTL-810217LP

MEMORANDUM OPINION AND ORDER

Adopted: March 11, 1985; Released: March 14, 1985

BY THE COMMISSION:

1. The Commission has before it an application for review filed by Apogee Broadcasting Corporation, ("Apogee") of an action of the Mass Media Bureau staff, denying its petition for reconsideration and returning its above-captioned application.

2. Apogee submitted its application for a new low power television station on Channel 52 in Fort Collins, Colorado, on February 17, 1981. The application was returned on June 30, 1983, as unacceptable for filing because it would cause objectionable interference to television translator station K59AA, (licensed to Translator TV, Inc., in Estes Park, Colorado), in violation of Section 74.707 of the Commission's Rules, 47 C.F.R. §74.707 (1984).

3. Apogee filed a petition for reconsideration on July 29, 1983, requesting a waiver of the Commission's interference rules based on

consideration of terrain shielding factors. The Bureau staff denied the petition on November 4, 1983, citing the *Low Power Television Report and Order*, 51 RR 2d 476, 495 (1982) and *Reconsideration*, 53 RR 2d 1267, 1274 (1983), in which we stated that we would not consider terrain shielding because there is no universally accepted method of predicting its effects. We further stated that we did not wish to be embroiled in disputes that would not be resolvable by accepted standards, thereby frustrating our efforts to expedite grants of low power television licenses. Additionally, the staff stated that since we had determined that the public interest would best be served by excluding the use of terrain shielding in application processing, granting a waiver in this instance would violate the policy behind this determination by deterring us from our goal of expeditious licensing.

4. In its application for review, Apogee concedes that interference is predicted under the Commission's technical standards, but reiterates its request for a waiver of these standards based on terrain shielding. As grounds for a waiver, it references the analysis of its consulting engineer to demonstrate that interference will not be caused to K59AA. Apogee points out that both Apogee and K59AA agree that no interference will occur due to terrain blockage, and that, even if it should occur, Apogee pledges to cease operation until such interference is resolved. Apogee concludes, therefore, that the Commission's administrative rationale for the exclusion of terrain shielding considerations in low power television application processing does not apply in this case, because the effect of the terrain blockage here is indisputable. As additional grounds for a waiver, Apogee claims that its proposed station will provide a new voice in the community.

5. The Bureau has correctly reiterated Commission policy against the use of terrain shielding in low power television and television translator interference studies, and we affirm it. *See Holston Valley Broadcasting Corporation*, FCC 84-453, released September 28, 1984; *Arnold N. Applebaum*, FCC 84-569, released November 30, 1984; *Low Power Television Report and Order*, (*"Filing Windows"*), 57 RR 2d 234, 242 (1984).[1]

6. With respect to Apogee's argument that it has made the requisite showing of unique public interest factors for a waiver based on consideration of terrain shielding, we do not agree for several reasons. First, we are not persuaded by Apogee's engineering showing. The showing consists of: (1) a single terrain profile plot along the path between Apogee's proposed transmitter site and the site of translator station

[1] The Commission did however, leave open the possibility of reconsidering the terrain shielding issue when the flow of applications diminishes. *See Filing Windows, supra*, at 242.

K59AA; and (2) a computer printout showing predicted field strengths of K59AA and other propagation predictions at various points along the path. The analysis includes predictions of terrain "shadow losses" according to methods purportedly described in National Bureau of Standards (NBS) Technical Note 101. The showing concludes that if terrain shielding is taken into account, Apogee's proposed site would be located outside the "Grade B" contour of K59AA.

7. As we have stated in the cases cited in paragraph 5, *supra*, we cannot accept interference analyses based on terrain shielding studies, since there is no universally accepted method of performing or evaluating such studies, and because the acceptance of such studies would invite controversy, even if studies were allowed merely for the purpose of determining whether a terrain barrier is of such "indisputable" magnitude as to prevent the occurrence of interference. We cannot afford to perform a large number of detailed case-by-case evaluations in which the varying results of different terrain models would be pitted against each other with respect to predicted interference. The results of any terrain shielding study, such as that submitted by Apogee, are subject to varying assumptions regarding important signal path parameters, the specific model used, and interpretation of the results. Considering the complexities of terrain considerations in propagation analysis, the lack of a standard method and the large number of low power television and television translator applications now pending, it is not only impractical for us to perform or evaluate detailed analyses of this type, but to do so would drastically impede our ability to rapidly authorize stations and implement the low power television service.

8. Further, even if we allowed terrain shielding considerations in this service, we would find that Apogee's engineering showing does not describe the specific model in NBS Technical Note 101 used to predict shadow losses, nor the underlying engineering assumptions in the model concerning signal path parameters. The showing also does not include a sufficient explanation of all numerical results of the analysis, nor does it define the coded notations that appear on the computerized output. Second, Apogee has not shown that its analysis of a single propagation path would adequately demonstrate noninterference due to terrain shielding. Third, the conclusion of Apogee's showing that its site would be located outside of the protected contour of K59AA does not completely address the predicted interference violation. Apogee's proposed facility would violate 74.707(d)(5) of the Commission's Rules. This rule prohibits the overlap of the 74 dBu signal contours of a UHF low power television proposal and an authorized UHF low power television or translator station, such as K59AA, operating seven channels above the channel

requested in the proposal.[2] Apogee's showing fails to consider the location of the 74dBu contour of its proposed station and whether the two predicted contours would overlap.

9. As its second ground for waiver, Apogee submits letters from Apogee's president, Arthur Levy, and from Richard N. Stratham of Translator TV, Inc., licensee of K59AA, stating their beliefs that no interference will occur. Apogee also pledges to cease operation, in the event that interference occurs, until such interference is resolved. The Commission does not, however, accept agreements to circumvent the application acceptance standard in the low power television service. *Las Manzanas*, FCC 84-570, released January 11, 1985. Acceptance of a pledge or agreement promising to eliminate interference in the future would completely disrupt low power television application processing by rendering useless the predicted interference standards which determine the technical acceptability of an application, and would result in the acceptance for filing of applications that are patently not in compliance with Section 73.3566 of the Commission's Rules.[3] It would enable a low power television applicant to circumvent the predicted interference rules by simply promising to eliminate any interference caused to another station once its low power television facility becomes operational. Such an accommodation would not only be counterproductive, but it would substantially impede the licensing process, by requiring the staff to reprocess applications every time such an agreement is reached. It would also prejudice all other similarly situated applicants, by making it impractical, if not impossible, for them to keep track of private agreements between other mutually exclusive applicants and authorized stations.

10. Apogee's final basis for waiver is that it will provide additional service to the community. However, this factor is applicable to all low power television and television translator applicants and does not provide a unique public interest ground for waiving technical standards in the specific circumstances of this case. Therefore, we conclude that Apogee has failed to make an affirmative showing of public interest factors under *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) to establish that the public interest would be better served by a waiver than by adhering to the Commission's policy not to consider terrain shielding and its policy not to accept promises by parties to resolve future interference.

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[2] Section 74.707(d)(5) provides protection against interference caused by radiation emitting from the local oscillator of television receivers which are tuned to receive a channel that is seven channels below another channel viewed in the same locality.

[3] Section 73.3566(a) of the Commission's Rules provides, in pertinent part: "Applications which are determined to be patently not in accordance with the FCC rules . . . will be considered defective and will not be accepted for filing . . . " 47 C.F.R. §73.3566(a)(1984).

11. Accordingly, IT IS ORDERED, That the application for review filed by Apogee Broadcasting Corporation IS DENIED.

12. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail - Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Billing Practices
Deregulation
Tariff
Telephone Disconnection

Notice of Proposed Rulemaking adopted to detariff billing and collection services and examine the possibility of imposing a nationwide prohibition of local exchange service disconnections for nonpayment of interstate toll charges.
—Billing/Collection Services
CC Docket No. 85-88

FCC 85-146

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Detariffing of Billing and Collection Services	CC Docket No. 85-88

NOTICE OF PROPOSED RULEMAKING

Adopted: March 28, 1985; Released: April 9, 1985

BY THE COMMISSION:

I. Introduction and Background

1. In this proceeding we propose to detariff billing and collection services.[1] From the outset of the Commission's brief regulatory experience with billing and collection, we have expressed doubt as to the necessity of subjecting such services to regulation under Title II of the Communications Act, 47 U.S.C. §§ 201 *et seq.*[2] These misgivings were

[1] Billing and collection, in this context, refers to a service provided by a local exchange carrier to an interexchange carrier (IC), whereby the former bills and collects from end users subscribing to an IC's service. More specifically, this service includes recording IC message detail, aggregating the details to create individual messages (a completed call originated by IC's end user), applying the IC's rates to such messages, processing these rated messages into customer invoice form, mailing bills, collecting payments, accepting customer deposits, handling customer inquiries and investigating billing evasion activities.

[2] *See* MTS/WATS Market Structure (Phase I), CC Docket No. 78-72, 97 FCC 2d 682, 741 (1984) (*First Reconsideration Order*).

confirmed when the Commission encountered difficulties in reviewing the billing and collection section of the access tariffs.[3] The difficulties stemmed from the Commission's lack of experience in regulating billing and collection[4] and the fact that billing and collection does not seem to be a communications service *per se*. It appeared to us that to the extent billing and collection is, or at least has the potential to become, a competitive service, marketplace regulation should be able to supplant tariff regulation. Hence, we decided to institute a proceeding to examine the possibility of detariffing billing and collection services.[5]

2. Billing and collection is presently offered under tariff to accommodate a Modification of Final Judgment (MFJ)[6] requirement that if a Bell Operating Company (BOC) offers such service to even one IC, the charge must be included in the BOC's access tariff. Because only common carrier services can be tariffed, however, we required that an exchange carrier offering a billing and collection service to one IC must offer the same service to all ICs.[7] Although we initially declined to impose a rate of return constraint on the billing and collection rate element,[8] the level of the proposed charges gave us cause to reconsider that decision.[9] Anticipating that the American Telephone and Telegraph Company (AT&T) would pass these excessive billing charges along to long distance customers, we decided to limit exchange carriers to a return of no more than 12.75 percent on billing and collection services.[10]

3. One issue raised by the billing and collection tariffs which has been of particular concern to us, and which to a large extent is at the fulcrum of this proceeding, is the so-called local cut-off problem: that is, denial of

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[3] *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 97 FCC 2d 1082, 1283 (1984) (*February 17 Order*).

[4] Prior to the divestiture of the Bell System, billing and collection was traditionally performed either by the carrier itself or by contract. Consequently, there was virtually no historical data by which to judge the reasonableness of the proposed rates and practices.

[5] *February 17 Order*, 97 FCC 2d at 1285.

[6] United States v. AT&T, 552 F. Supp. 131, 234 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[7] *See* Section 69.114(a) of the Commission's Rules, 47 C.F.R. § 69.114(a). *See also* MTS/WATS Market Structure, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 313 (1983) (*Access Charge Order*).

[8] *Access Charge Order*, 93 FCC 2d at 314. Section 69.114(b) of the Commission's Rules, 47 C.F.R. § 69.114(b), did require, however, that charges for these services be both reasonable and nondiscriminatory. *See also First Reconsideration Order*, 97 FCC 2d at 742.

[9] Representatives of the exchange carriers had informed us that, at the file rates, industry earnings for billing and collection would be about $479 million above a 12.75 percent return. Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, and MTS/WATS Market Structure, CC Docket No. 78-72, Phase I, 49 Fed. Reg. 23924 (June 8, 1984), at para. 82.

[10] *Id.* at para. 83.

local exchange service for nonpayment of IC service charges. In the *February 17 Order*,[11] we questioned the reasonableness of this practice because in the post-divestiture era local and long distance services are generally no longer provided by related companies. The exchange carrier's relationship to the end user with respect to the service provided by the IC is merely that of billing agent or holder of IC receivables. We noted that a serious question of fairness to end users is raised where a subscriber's local telephone service is placed in jeopardy by an exchange carrier acting in such a capacity. At the same time, however, we recognized that there may be technical limitations inherent in certain types of switching equipment which could effectively preclude compliance with a prohibition on local cut-offs. Hence, we required carriers to submit technical justification for this provision by showing what operational restraints would prevent separate termination of local and interexchange service.

4. The justification proferred by the carriers was found to be materially incomplete. Thus, we required that all local cut-off provisions be deleted from the tariffs.[12] Carriers subsequently applied for waivers[13] of this prohibition, further alleging that the technical limitations of most switching systems make separate screening and blocking of interstate toll calls impossible in some end offices and difficult in others. They also maintained that these technical problems are compounded by administrative burdens, given the inability of current mechanized billing systems to process partial payments for multiple balances due on a single customer account. Moreover, AT&T contended that unless carriers were permitted to continue local cut-offs, AT&T's uncollectibles would double, causing a serious decline in its rate of return. Given this information we decided to modify our treatment of this issue on a temporary basis by allowing local cut-offs where permitted by state authority.[14]

II. Discussion

5. We approach this subject from the standpoint of our role as a regulator of communications services. Inasmuch as billing and collection is essentially a financial and administrative service, it may not be an appropriate subject for Title II regulation. On the other hand, to the

[11] 97 FCC 2d at 1289.

[12] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, FCC 84-188, released Apr. 27, 1984, at 8-2 (*April 27 Order*).

[13] We had invited carriers to apply for temporary waivers provided that a complete technical showing could be made in support thereof.

[14] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, Mimeo No. 4246, released May 16, 1984 (*Waiver Order*). Since state rules would apply while this matter was under review, we decided there was no need for any reference to local cut-offs in tariffs on file with this Commission.

extent that the billing and collection function has an effect on services which are within our purview, we do have a regulatory interest and must deal with it accordingly. For example, the fact that ICs pass billing costs along to end users by bundling them into long distance rates led us to impose a rate of return constraint on billing and collection services. Indeed, the high level of the charges proposed prior to our setting a return is perhaps evidence that carriers do not view billing and collection as a competitive service at the present time. Nevertheless, any need for such regulation should be short-term. In the immediate aftermath of divestiture, AT&T had little choice but to continue its billing arrangements with the BOCs. There are already indications, however, that AT&T is developing its own billing system.[15] ICs other than AT&T have never had to rely on local telephone companies to do their billing. They have either set up their own systems or contracted with commercial billing firms such as major credit card companies to do it for them.

6. Hence, there appears to be no reason to believe that exchange carriers would be able to extract monopoly profits from billing and collection services if those services are detariffed. As we recognized in the *First Reconsideration Order*, billing and collection performed for third parties is not inherently part of a local exchange carrier's bottleneck monopoly.[16] Because billing and collection functions can be performed internally or be obtained from competing vendors, we expect that market forces can readily respond to excessive rates or unreasonable practices. We therefore seek comment on the extent to which competition in billing for interstate telephone services presently exists or can be expected to develop.

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[15] For example, AT&T recently dropped billing inquiry service, a sub-offering of billing and collection service, provided by the New York Telephone Company. In fact, the Joint Board recently noted that AT&T had stated that it planned to initiate its own billing inquiry service in 22 states by January 1, 1985 and to complete the transition to use of its own billing inquiry centers for the areas served by the BOCs by August 1985. AT&T has stated that it is taking this action primarily for customer relations reasons. *See* Recommended Interim Order and Request for Comments, CC Docket Nos. 78-72 and 80-286, Mimeo No. 3400, released Mar. 25, 1985, at para. 4 (*Joint Board Order*). In addition, according to the Mountain States Telephone and Telegraph Company, AT&T has indicated that it is considering providing its own billing and collection services for its largest customers and certain smaller customers. Mountain States Telephone and Telegraph Company Special Permission Application No. 32, filed Feb. 14, 1985. *Cf.* Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), CC Docket No. 81-893, Memorandum Opinion and Order on Reconsideration, FCC 85-35 (released Jan. 29, 1985) at para. 61 & n.82 (AT&T phasing out reliance on BOCs for embedded customer premises equipment billing services).

[16] *First Reconsideration Order*, 97 FCC 2d at 742.

7. The ability of exchange carriers to impose local cut-offs for nonpayment of IC service charges could conceivably hinder the development of such competition by deterring market entry by other billing agencies. While we are not prepared to say that this ability would enable carriers to monopolize, or even acquire a larger share of, the broader commercial billing market, we do believe that use of their leverage over a monopoly communications service to coerce payment represents an abuse of their power to control access to such monopoly service. Inasmuch as billing and collection is not inherently a communications service, the systems set up by the carriers for the purpose of billing telephone calls can be used to bill other products and services as well.[17] Thus, for example, a consumer's local telephone service could be discontinued for nonpayment of a department store bill. In our view it is unfair for a person's local telephone service to be terminated for nonpayment of an unrelated service when in fact he is paying his local service bill.

8. A number of the pleadings concerning reconsideration of the *April 27 Order* and the *Waiver Order* took the position that the Commission should defer to state regulatory authorities with respect to local cut-offs because the issues involved are better suited to state resolution.[18] AT&T, on the other hand, argued that there should be a federal solution to this problem in order to ensure consistency.[19] As matters stand, we have deferred to the states on a temporary basis. We would like to receive additional comment as to whether this approach should be adopted on a permanent basis or whether there is a federal interest in imposing a nationwide prohibition of local cut-offs for nonpayment of charges unrelated to the local carrier's service. Such a prohibition would apply independent of any detariffing action the Commission may decide to take. We also solicit further information from carriers as to their technical ability to perform interstate-only cut-offs. More specifically, information is sought as to the scheduled availability of different generations of software which would make it possible to discontinue toll service without also disconnecting local service, and taking that one step further, to discontinue interstate toll separately from intrastate toll service.[20] Similarly, we will need information as to software which allows carriers to

[17] To the extent that carriers do perform billing and collection for noncommunications services they may be subject to other state or federal regulations.

[18] *See* Petition for Reconsideration of the New York State Department of Public Service, CC Docket No. 83-1145, June 8, 1984; Reply Comments of the Telephone Companies, CC Docket No. 83-1145, Aug. 1, 1984; Comments of Bell Atlantic, CC Docket No. 83-1145, July 17, 1984.

[19] *See* Petition for Partial Reconsideration of AT&T, CC Docket No. 83-1145, May 7, 1984.

[20] To the extent that these might not be severable, we might find it necessary to preempt state authority should we find that there is a federal interest in addressing this issue. There is the possibility, however, of referring such a matter to a Federal-State Joint

block access to an individual IC without also restricting access to other ICs with points of presence in the local access and transport area involved.

9. Although we tentatively conclude that Title II regulation may not be necessary for billing and collection,[21] at least not to the extent that it is considered a financial service, the billing and collection rate element does include one function which appears to be directly ancillary to a communications service — recording.[22] As noted in the *February 17 Order*, "the facilities involved in recording are clearly germane to the telephone company. To the extent that recording is performed in the normal course of network operations, there would be a wasteful duplication of facilities were it to be done by some other entity."[23] Therefore, because the recording function does not seem to be potentially competitive and does exhibit some of the characteristics of a communications service, we propose to draw the line here and keep the recording function under tariff.

10. As to the mechanics of detariffing, carriers would, of course, be required to remove the costs associated with billing and collection from their regulated accounts and revenue requirements.[24] In this regard, we seek comment on whether all carriers should simply be required to maintain separate accounting for their billing and collection activities or whether the BOCs (as dominant carriers) should be required to offer these detariffed services through a separate subsidiary. We also solicit comment on the types of separate accounting requirements which should be established.

11. Furthermore, the removal of billing and collection costs from carriers' rate bases and operating expense accounts may raise questions with respect to jurisdictional separations. The Federal-State Joint Board recently solicited comments concerning permanent changes in the procedures for allocating Account 645, Local Commercial Operations (which are

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Board under Section 410(c) of the Communications Act, 47 U.S.C. § 410(c), which could then propose uniform rules with respect to service disconnections.

[21] To the extent that it may be argued that detariffing would be inconsistent with the MFJ, we are of the view that the court did not intend to impose a regulatory obligation upon this Commission which conflicts with our statutory mandate. We suspect that the court simply saw tariffs as a mechanism for assuring that ICs have nondiscriminatory access to billing and collection services and that the rates BOCs charged AT&T for these services fully covered costs.

[22] Recording is the entering on magnetic tape or other acceptable medium of the details of IC messages originating through Switched Access Service. The assembly and editing function then identifies the message details for a particular IC, aggregates the details to create individual messages and verifies that the data required for rating is present.

[23] *February 17 Order*, 97 FCC 2d at 1284-85.

[24] To the extent that carriers jointly bill their own services and IC services in a single mailing there will be joint and common costs such as postage and envelopes. We seek comment on how the allocation of such costs should be treated.

reflected in the charges for billing inquiry service), as well as "the need for changes in the procedures for the allocation and recovery of Account 662, Accounting Department costs, in light of the post-divestiture environment in which AT&T may discontinue its use of the billing and collection services offered by the local exchange companies."[25] Comments and replies in that proceeding are due April 22 and May 13, 1985, respectively. This should give interested parties in the present proceeding ample time to comment before the Joint Board on any separations changes that might be appropriate in light of the action we are proposing herein.[26]

12. We propose to make detariffing permissive initially, but mandatory at a later date so that all carriers will be required to withdraw their billing and collection tariffs by a date to be determined later in this proceeding.[27] Carriers will be free to withdraw their tariffs any time during this initial period. We propose, however, that carriers choosing to keep tariffs on file at the Commission during the permissive stage will be subject to the same notice and cost support requirements as are applicable to other tariffs and will be limited to a fixed rate of return.

13. Regardless of whether carriers withdraw their tariffs during the permissive or mandatory stage, there will still be the possibility of residual regulation through the complaint process under Section 208 of the Act, 47 U.S.C. § 208. Such complaints, however, would have to be limited to billing problems that have a direct and immediate effect on a communications service. Our expectation is that most billing-related complaints, such as unlawfully high interest rates, will be handled in a different forum.[28]

14. This Notice of Proposed Rulemaking is being issued to determine whether the detariffing of billing and collection services provided by local exchange carriers to ICs is just, fair and reasonable, and in the public interest. We expect to develop in this notice and comment rulemaking all the relevant material and probative data and information needed to make the public interest determination.[29]

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[25] *Joint Board Order* at para. 25.

[26] In their filings before the Joint Board, interested parties need not limit their comments solely to the allocation and recovery of costs in Account 662. Any other separations issues raised by our proposals in this proceeding should also be addressed in the Joint Board filings.

[27] We seek comment as to what would be a reasonable time frame for this purpose.

[28] Should a dispute be properly before us, we might require under Section 211(b) of the Act, 47 U.S.C. § 211(b), that any relevant contracts be filed with the Commission.

[29] The Joint Board recently recommended that the Commission adopt interim separations procedures to prevent a sudden and substantial shift of costs to the intrastate jurisdiction as a result of AT&T's decision to implement its own billing inquiry service and discontinue use of these services offered by the BOCs. Deregulation of billing inquiry as well as other billing and collection services should not complicate potential

III. Ordering Clauses

15. Accordingly, IT IS ORDERED, that a rulemaking proceeding IS INSTITUTED to determine whether the detariffing of billing and collection services is just, fair and reasonable, and in the public interest. This proceeding is instituted pursuant to Sections 2(a), 4(i), 4(j), 201, 202, 203, 205, and 403 of the Communications Act, 47 U.S.C. §§ 152(a), 154(i), 154(j), 201, 202, 203, 205, and 403.

16. IT IS FURTHER ORDERED, that interested persons may file written comments on or before May 10, 1985 and reply comments on or before May 24, 1985. In reaching its decision in this matter the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order. All comments and reply comments shall be filed in accordance with Sections 1.411-1.419 of the Commission's Rules, 47 C.F.R. §§ 1.411-1.419. Materials filed in this proceeding will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M St., N.W., Washington, D.C.

17. IT IS FURTHER ORDERED, that for purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments or pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral

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cost allocation and recovery issues associated with AT&T's discontinuation of these services. Rather, deregulation will give the BOCs greater flexibility in structuring and pricing these service offerings, and enhance their ability to attract and retain customers.

As previously noted, the Joint Board has requested comments concerning the need for changes in the procedures for allocating the accounts related to the provision of billing inquiry and other billing and collection services. *See* para. 11, *supra*. Any separations questions raised by the possible deregulation of these services will be considered in the context of the Joint Board proceeding.

presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231.

18. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96-354) IT IS CERTIFIED, that Sections 603 and 604 of the Act do not apply to this proceeding because this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. §§ 603, 604, 605(b). It is our expectation that marketplace alternatives will afford interexchange carriers adequate protection against any unreasonably high rates which may be set by local exchange carriers for billing and collection services. Further, we propose to dispose of the issue of local service disconnections for nonpayment of interstate toll charges in such a way that the interests of end users will be accommodated in the detariffing process.

19. IT IS FURTHER ORDERED, that the Secretary shall cause this Notice of Proposed Rulemaking to be published in the Federal Register.

20. IT IS FURTHER ORDERED, pursuant to Section 220(i) of the Communications Act, 47 U.S.C. § 220(i), that the Secretary shall serve a copy of this Notice on each state commission.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Application, Certification of
Candor
Ownership and Management, Integration of

In hearing matter of mutually exclusive CP applications for FM station in Lamar, Review Board reverses ALJ's grant and awards it to a competing applicant. The Board held that two demerits against FM 105 outweighed its slight integration preference.
—*Broadcast Associates of Colorado*
MM Docket No. 83-1218

FCC 85R-25

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Broadcast Associates Of Colorado A Limited Partnership Lamar, Colorado	MM Docket No. 83-1218 File No. BPH-821209AC
FM 105, Inc. Lamar, Colorado	MM Docket No. 83-1219 File No. BPH-830321AN
For a Construction Permit for a New FM Station	

Appearances

Richard Hildreth, *Vincent J. Curtis, Jr.* and *Robert A. Depont* on behalf of Broadcast Associates of Colorado; and *Gene A. Bechtel* and *Ann C. Farhat* on behalf of FM 105, Inc.

DECISION

Adopted: March 11, 1985; Released: March 19, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER BLUMENTHAL: BOARD CHAIRMAN MARINO DISSENTING WITH STATEMENT.

1. This proceeding involves the mutually exclusive applications of Broadcast Associates of Colorado (Associates) and FM 105, Inc. (FM 105) for authority to construct a new FM broadcast station on Channel 289C in Lamar, Colorado. By *Hearing Designation Order*, released November 8, 1983 (Mimeo No. 665), the case was set for hearing on an air hazard issue against FM 105, and on the standard comparative issue. The air hazard issue was summarily resolved in favor of the applicant. Tr. 19-20.

2. In an *Initial Decision (I.D.)*, FCC 84D-61, released August 31, 1984, Administrative Law Judge John H. Conlin (ALJ) granted FM 105's application after concluding that FM 105 was the comparatively superior applicant under the "integration" of ownership and management criterion.[1] In reaching a determination that FM 105 was the overall superior applicant, the ALJ accorded minor significance to certain derelictions, which he termed "other matters," imposing a slight demerit for FM 105's participation in an improper certification. The ALJ also admonished that applicant for fabricating testimony during a deposition session concerning retention of counsel. This proceeding is now before the Review Board on exceptions filed by Associates. We have reviewed the *I.D.* in light of the exceptions and reply briefs, the oral argument held January 11, 1985, and our independent examination of the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, but we reverse certain of his conclusions on the so-called "other matters" and ultimately conclude that a grant of Associates' application would better serve the public interest, convenience, and necessity. We turn first to the exceptions under the standard comparative issue.[2]

3. *Integration of Ownership and Management.* Associates is a limited partnership whose sole general partner, Don N. Yoxsimer, plans to devote full-time (at least 40 hours per week) to the proposed station as general manager. *I.D.*, paras. 3-4. Except for the time spent during his university schooling, 1973-1978, where he majored in broadcast communications arts and worked as an intern at AM Station KREO, Indio, California, Yoxsimer has been a resident of Lamar since 1969. *Id.*, paras. 5-6. He also worked at Stations KLMR-AM-FM, Lamar, from 1979-1982 in various roles including sales representative and as a reporter covering area school meetings, Chamber of Commerce activities, and other local civic events. *Id.*, n.1. Since 1970, he has been "physically handicapped" as a result of an automobile accident and has medically been classified as an

[1] *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395-396 (1965).

[2] The ALJ found that participation of ownership in management was the only sufficient basis under the standard comparative issue where a comparative choice could be made. The parties have not excepted to this finding, and we agree that further discussion of the other factors under the comparative issue is unnecessary.

"incomplete quadriplegic." *Id.*, para. 7. FM 105, its opponent, is a Colorado corporation whose sole stockholder is Clara Ines Oxley. *Id.*, para. 9. Ms. Oxley also pledged to work fulltime as general manager at the proposed station. *Id.*, para. 10. She has lived near Lamar since 1970, operating a retail clothing store in Lamar since 1980. *Id.*, paras. 13-14. Her civic activities include, *inter alia*, membership in the Prowers County Republican Party (officer of the central committee); advisor from 1979-1980 to the Southwest Colorado Mental Health Center (appointed by County Board of Comm'rs); and membership in the Lamar Chamber of Commerce (on the retail trades committee). She has no broadcast experience,*id.*, para. 10, was born in Colombia, South America, and came to the United States in 1969. *Id.*, para. 11.

4. The ALJ credited both applicants with 100% quantitative integration, *id.*, para. 25, finding no basis for distinguishing the applicants in terms of local residence and awarding offsetting preferences to FM 105 and Associates for civic participation and broadcast experience, respectively. *Id.*, para. 28. He further concluded that the decisive factors under the integration criterion were the minority and female enhancement to which FM 105 was entitled for Ms. Oxley's participation. *Id.*, para. 29.

5. Associates attacks the 100% quantitative integration credit awarded FM 105, arguing that Ms. Oxley's proposal cannot be taken at face value in light of the extensive assistance furnished by her family and attorney, in contrast to her own limited participation, in prosecuting her application. We must deny this exception. There is no evidentiary support to contradict her representation that she will serve as the station's general manager, and such a representation "should not be brushed aside unless compelling evidence to the contrary is available." *Bisbee Broadcasters, Inc.*, 48 FCC 2d 291, 293 (Rev. Bd. 1974).

6. Associates also challenges the preference awarded FM 105 for Ms. Oxley's civic participation, arguing that it is not equivalent, let alone superior, to Mr. Yoxsimer's civic activities. In this regard, Associates charges that it was error for the ALJ to consider under broadcast experience, rather than local civic affairs, Mr. Yoxsimer's reporting activities on local events for Stations KLMR-AM-FM in Lamar.[3] Credit is awarded for past *participation* in civic affairs since it indicates a knowledge of and commitment to the welfare of the community. *See Policy Statement on Comparative Broadcast Hearings, supra*, 1 FCC 2d at 396; *Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1109 (Rev. Bd. 1984). On the other hand, "mere diversity of business interests [is not] considered." *Policy Statement, supra*. Although the ALJ perhaps

[3] The ALJ also credited other activities by Mr. Yoxsimer, which included master of ceremonies at the Special Olympics for the Lamar area and speaker at a Lion's Club function. *I.D.*, para. 27.

understated Associates' civic enhancement credit (there is evidence that Yoxsimer's reporting activities stemmed from a desire to become involved in the community, *see* Associates Exh. 2, p.6), the fact remains that Mr. Yoxsimer carried out his reporting duties as an employee of the station. In contrast, Ms. Oxley was an active member in a number of community organizations and participated on various committees in leadership roles. Ms. Oxley's more extensive activities here beget a slightly greater enhancement.

7. Associates next contends that it was error for the ALJ to award enhancement credit to FM 105 for Ms. Oxley's minority status without requiring a showing that she was, in fact, disadvantaged.[4] It argues that recent Supreme Court rulings in affirmative action cases clearly hold that racial or sexual favoritism is impermissible in the absence of a determination that a particular individual has been disadvantaged by past discrimination. We are constrained to deny this exception, for until invalidated the Commission's policy is that embodied in *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1264, *aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), *petition for certiorari denied*, Case No. 84-700, March 4, 1985.

8. Associates' final exception under this criterion relates to the failure to award it enhancement credit based upon Mr. Yoxsimer's physical handicap. Associates recognizes that the Board has previously rejected claims for a preference based upon a physical handicap, *see Webster Baker Broadcasting Co.*, 88 FCC 2d 944, 955 (Rev. Bd. 1982), but attempts to distinguish that case from the instant one; that is, it states, in *Webster Baker* there was no showing that ownership of the broadcasting facilities by a handicapped person would foster program diversity, whereas here it is alleged that such evidence is contained in Associates' direct case. We are not convinced that the instant case is distinguishable from *Webster Baker*, and no enhancement credit will be granted.

9. *Other Matters*. By *Orders* released May 21, 1984 (FCC 84M-2372 and FCC 84M-2373), the ALJ denied two petitions to enlarge issues filed March 19 and April 9, 1984, respectively, by Associates concerning an improper certification and various alleged misrepresentations by FM 105's Ms. Oxley, before and during hearing. His denial was predicated in part on the fact that evidence concerning the allegations was already in the record and that no valid purpose would be served by holding further hearings. *See, e.g.*, FCC 84M-2373, *supra*. On the suggestion of FM 105 (against whom the allegations were directed), the ALJ agreed that the more orderly and expeditious course would be to permit the parties to argue the above matters in their proposed findings. *Id*.

[4] Associates does not challenge the propriety of the Commission's minority favoritism *per se*. *But cf. Firefighters Local Union No. 1784* v. *Stotts*, 104 S.Ct. 2576 (1984).

10. The *I.D.* found that Ms. Oxley had participated in an improper certification, since she had not reviewed or approved the engineering portion of her application at the time the application was certified as true, complete, and correct to the best of her knowledge. *I.D.*, para. 18. It concluded, however, that there was mitigating evidence which, *citing WEBR, Inc.* v. *FCC*, 420 F.2d 158, 167-168 (D.C. Cir. 1969) and *WIOO, Inc.*, 95 FCC 2d 974, 990-991 (1983), justified the assessment of only a slight demerit. *I.D.*, paras. 31, 34 (*i.e.*, the engineering information was correct, Ms. Oxley was acting in accordance with instructions by counsel, there was no evidence of bad faith, and her testimony was at all times direct and candid). *Id.*, para. 31. The ALJ further found that Ms. Oxley lied during a deposition session concerning the circumstances surrounding her retention of counsel, but he accepted her explanation that she was fatigued, emotionally distressed, and intimidated by her surroundings at the time. *Id.*, paras. 22-23. Although not condoning her behavior, the ALJ ruled that no demerit was justified since "it was the product of a spontaneous misjudgment made under trying circumstances, rather than a calculated effort to deceive," and the misstatement was voluntarily corrected by the applicant prior to the hearing. *Id.*, para. 33. The ALJ rejected the remaining allegations of misrepresentation. *Id.* para. 32.

11. Associates contends that the failure to disqualify FM 105 or to assess it a substantial comparative demerit for the improper certification was error. It notes that the engineering portion of the application was dated on March 17, 1983 by the FM 105 engineer; that Ms. Oxley certified the application twice, once on March 14 (which certification contained a March 14 date); and a second time on March 17 when the date was left blank; and that the application, as filed on March 21, contained a March 18 date, which apparently was added at counsel's office after the engineering portion was attached to the application. Associates argues that the second certification was necessary, since the first was dated and would have thus revealed that Ms. Oxley had signed the application before the engineering had been prepared; and that the second copy was deliberately left undated by Ms. Oxley so that the engineering portion would be attached to the application and given a date that would "create the appearance of normalcy so as to avoid the obvious questions which would be raised if both the non-engineering portion (signed in Lamar) and the engineering portion (signed in Washington, D.C.) carried the same date (March 17)."[5]

12. Although we do not believe that the evidentiary record is strong enough to demonstrate deliberate misleading behavior as charged by Associates, we are troubled by the event and conclude that it warrants more than the slight demerit imposed by the ALJ. First, it is undisputed that the entire application was not before Ms. Oxley when she certified,

[5] Associates Exceptions at 11, 12.

not once but twice, as to its accuracy *and* completeness. Second, the application explicitly calls for the date along with the signature of the applicant (*i.e.*, "Signed and dated this ___ day of _____, 19___."), but no date was inserted at the time the application was certified. And FM 105 never gave an explanation as to why Ms. Oxley left the form undated. Although there is no evidence that Ms. Oxley acted in bad faith (she acted on instructions from counsel, Tr. 198), or that the engineering information was incorrect, we do not view these derelictions as merely a technical certification violation.[6] The Commission has on many occasions emphasized that its ability to fulfill its statutory responsibilities "rests in considerable measure on its being able to rely upon each of those whom it licenses to observe conscientiously the Rules of the Commission. . . ." *Nick J. Chaconas*, 28 FCC 2d 231, 233 (1971). This is particularly so as the Commission increasingly relies on the certification mechanism in its application process.

13. The two cases cited by the ALJ do not preclude us from imposing more than a slight demerit in the instant case. In *WEBR, Inc.* v. *FCC*, *supra*, the D.C. Circuit Court of Appeals merely held that it was permissible for the Commission to find that an applicant acting in good faith reliance on counsel should not be disqualified on character grounds for having failed to come forward with relevant information. It did not rule out the possibility of imposing a lesser sanction; and, in fact, noted that a demerit had been assessed. And in *WIOO, Inc.*, *supra*, the Commission assessed a slight demerit against an applicant where its principal filed amendments containing documents that did not exist at the time he executed affidavits attesting to their accuracy. The Commission noted that the principal's premature execution of affidavits was irregular, but concluded that there was no significant abrogation of responsibility, since the applicant not only anticipated reviewing the documents before their submission to the Commission, he did, in fact, review the documents prior to their submission. 95 FCC 2d at 991. In the instant case, however, there was a significant abrogation of responsibility on the part of FM 105, since there was no expectation that Ms. Oxley would be able to review and approve the engineering information prior to FM 105's submission. The sanction for such misconduct should, therefore, be more than the slight demerit imposed in *WIOO,Inc.*, *supra*. On the other hand, in *American International Development, Inc.*, 75 FCC 2d 67, 101 (ALJ 1979), *aff'd*, in

[6] We do not agree, however, with Associates that *American Christian Television System, Inc.*, 56 RR 2d 1445 (1984), supports its proposition that the improper certification, as a matter of law, rendered the application unacceptable for filing from the outset. Whereas Fm 105's application was not, on its face, incomplete or deficient, the cited case involved the return by the processing line of an application for a low power television station that omitted certain engineering data and a subsequent post-cut-off date, corrective amendment.

relevant part, 75 FCC 2d 109, 118-122 (Rev. Bd.1979), *rev. denied*, 86 FCC 2d 808 (1981), cited by Associates in support of its request for the disqualification of FM 105, an applicant was disqualified for signing two pages in blank before he had seen any part of the application and for continuing to misrepresent to the Commission at hearing that he had reviewed his application before it was filed. In the instant case, Ms. Oxley does not assert, nor has she asserted, that she reviewed the engineering information before the date on which it was filed. FM 105 will be given a moderate demerit for the improper certification. *Cf. Broadcast Communications, Inc.*, 93 FCC 2d 1162, 1173-1174, 53 RR 2d 805, 813-814 (Rev. Bd. 1983), *modified on other grounds*, 55 RR 2d 997 (1984).[7]

14. Associates also contends that the ALJ erred in failing to find that other actions by Ms. Oxley comprised a pattern of misrepresentation, requiring either the disqualification of FM 105 or the assessment of a decisional comparative demerit against it. Specifically, Associates points out that there were several inaccurate statements in her written direct case regarding the dates of Ms. Oxley's affiliation with various civic organizations, that she had given false deposition testimony regarding her retention of counsel, that her testimony at hearing regarding her efforts to obtain a transmitter site was inconsistent with her response to a petition filed by Associates raising a site availability question, and that she gave false testimony regarding the origination of her auxiliary power proposal. Except for the allegation concerning Ms. Oxley's deposition testimony regarding her retention of counsel, we shall not discuss these matters further since the *I.D.'s* findings and conclusions, which fairly

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[7] At oral argument before the Board, FM 105 counsel candidly submitted:

> BOARD QUESTION: So that we can have it on the record. The record seems to indicate that Mrs. Oxley sent to counsel on March 17th a signed certification. Is that correct?
>
> FM 105 COUNSEL: Yes, sir.
>
> BOARD QUESTION: Is it also clear that at the time she signed, she was not in position — possession of the engineering exhibit?
>
> FM 105 COUNSEL: We have so conceded. I think her testimony is that she couldn't say for sure, but from the timing of the engineering letter delivering the final product to us, we have conceded that as probably what happened. Yes, sir.

Tr. of Oral Arg. at 197. Moreover, when asked whether Ms. Oxley "sign[ed] that certification without the engineering exhibit upon advice of counsel," counsel responded: "I am sure she did." *Id.*, at 198. This is neither the time nor the forum to review the propriety of counsel's conduct, but we will refer a copy of this decision to the Commission's Office of General Counsel for its contemplation, and we admonish all counsel appearing before the Commission of their ethical responsibilities under 47 CFR §1.52 and other codes of professional ethics.

reflect the record evidence, support the ALJ's ultimate conclusion that these matters are inconsequential and the exceptions raise no decisionally significant matters that have not been adequately considered by the ALJ. *See I.D.*, paras. 19-21, 32.

15. However, Ms. Oxley's false deposition testimony cannot be glossed over so readily. The *I.D.* reflects that Ms. Oxley insisted at deposition that friends from medical school in Colombia referred her to communications counsel of record, when — in fact — it was actually a friend of her father-in-law who had done so. *I.D.*, para. 22.[8] The lie came to light when Ms. Oxley subsequently informed counsel, who was not present at the deposition, of the misrepresentation. *Id.*[9] Counsel then advised opposing counsel of the untruth and provided the correct information. *Id.* Ms. Oxley gave the following explanation for her dereliction:

> I had just returned from a very long trip. I have not slept for two days. I have returned from Colombia. Prior to my leaving the country, a very upsetting thing happened in my family. My three-and-a-half-month old niece died. It was a sudden death. And yet I had to leave because I had this appointment for this hearing in Lamar. So I came, it was, I was very flustered. I had arrived the night before to Lamar, I had not had time to talk to my counsel in Washington, I have not had time to review all the documents. I went into the room, and I sat down with two tape recorders, and I felt very threatened. I felt like I was not given a supposedly voluntary deposition, but that in fact it was a trial. I did not know how much I could disclose. I did not know what I could say about my attorney in Washington. And I was, I just wanted not to answer the question. [Tr. 34-35]

16. Ms. Oxley's dissimulation and her excuse ineluctably bring to mind that of another recent applicant principal who engaged in a similar "richly detailed fabrication," but pardoned himself because "he'd had no sleep the night before and that he'd had previously missed an airplane to 'the most important meeting of [his] life.'" *Washington's Christian Television Outreach, Inc.*, 56 RR 2d 1539, 1544 n.10 (Rev. Bd. 1984)(applications for

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[8] Associates claims that Ms. Oxley's motive for the false scent was to prevent it from learning that it was her father-in-law's attorney who had been the one who referred her to her communications attorney, therefore hampering further efforts on its part to get a real-party-in-interest issue. Associates suggests that "real" party to be her father-in-law.

[9] At oral argument, counsel conceded Ms. Oxley's false answers at deposition, *see*, *e.g.*, Tr. of Oral Arg. at 208, and confessed:

> FM 105 COUNSEL: I don't know why witnesses lie. I've been dealing with them for twenty-five years. They do. Sometimes they lie because they are bitter, because they're protecting a falsehood, because they have something to hide. Sometimes they lie because they're nervous because they perceive a problem in getting a correct answer. I really don't know. I know this, that she explained why she gave the answer. . . .

Id., at 207-208.

Comm'n review pending). We fear that this incident compounds Ms. Oxley's improper certification of her application and reflects a rather unfortunate proclivity to dissemble before the Commission. As in *People's Broadcasting Corp.*, 92 FCC 2d 1305, 1319 (Rev. Bd. 1983)(subsequent history omitted), we need not determine whether Ms. Oxley's misstatements warrant absolute disqualification or merely a substantial comparative demerit.[10] Much as in *People's Broadcasting*: "It is adequate here to review the evidence and exceptions and find that [FM 105] warrants, at least, a heightened substantial demerit" and "should be licensed only if the other [applicant fails]." *Id.*

17. *Petitions to Enlarge Issues*. Associates renews its request for an abuse of process issue filed March 16, 1984. The request was predicated upon an allegation that FM 105 had filed, and subsequently withdrawn, a frivolous petition to enlarge issues against Associates knowing that the allegations on which the petition was based were false. We will deny this exception since our examination of the pleadings leads us to the same conclusion reached by the ALJ: the motion and withdrawal "were made in good faith and that no abuse of the Commission's processes has occurred." *See Memorandum Opinion and Order*, FCC 84M-2371, released May 21, 1984. Associates further contends that the ALJ erred in failing to add a real-party-in-interest issue against FM 105 requested on December 14, 1983. In view of our demerit against FM 105 discussed in the preceding paragraph, this matter is now moot.

19. *Overall Comparative Evaluation*. While FM 105 was properly awarded a slight preference on the integration criterion, its demerits are fatal. *See generally People's Broadcasting, supra*, 92 FCC 2d at 1319. Thus, we conclude that a grant of Associates' application will better serve the public interest, convenience, and necessity.

20. ACCORDINGLY, IT IS ORDERED, That the application of Broadcast Associates of Colorado (File No. BPH-821209AC) for a construction permit to establish a new FM broadcast station at Lamar, Colorado IS GRANTED and the application of FM 105, Inc. (File No. BPH-830321AN) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL *Member, Review Board*

DISSENTING STATEMENT OF BOARD CHAIRMAN MARINO

This is an unusual case because a broadcast applicant and her lawyer conceded two faults which they candidly acknowledged early in the

[10] *See also WHW Enterprises, Inc.* v. *FCC*, No. 83-2067 (D.C. Cir. decided February 5, 1985), slip op. at 25 (case remanded for "appropriate sanction" for applicant's "lack of candor and material misrepresentation").

proceeding. The first fault was attributable to the lawyer's firm, the second to the applicant herself. A skilled, sensitive and experienced Administrative Law Judge assessed only a slight demerit for the derelictions for the reasons briefly summarized in the Board's *Decision*, at para. 10.

If the Decision were mine alone to make, the ALJ's recommendation would have been affirmed as more consistent with Board and Commission precedent. My objections are directed first to the last sentence in note 7 of the Board's *Decision*, which I believe is unjustified, and second to increasing the ALJ's slight demerit to a "substantial comparative demerit," *Decision* para. 16, to defeat Mrs. Clara Ines Oxley's undeniable substantial enhancement credit for both 100% female and minority ownership. Mrs. Oxley's preferences, like those in the controlling *Waters* case, *supra*, were also enhanced for local residence, civic, and political activities within the service area. Board Decision, paras. 3-7.

Implementing the equitable principles implicit in *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946) has been a sensitive task not only for this agency, but also for the reviewing Courts. *See*, the different opinions in *Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16 (D.C. Cir. 1972). It is noteworthy that in *Lorain Journal Co.* v. *FCC*, 351 F.2d 824, 830 (D.C. Cir. 1965), Judge Leventhal recognized that "[a] cardinal assumption of the regulatory system is undercut by a pattern of false or evasive reports." But later in *Sea Island Broadcasting Co.* v. *FCC*, 627 F.2d 240, 244 (D.C. 1980), he strongly urged the Commission to look for "clear and convincing evidence" before denying a broadcast license renewal even in a case of concrete commercial fraud and misrepresentations to the Commission.

Both broadcasters and lawyers were held to a higher standard than the morals of the marketplace by Judge Leventhal, who also recognized legitimate renewal expectancies. *See Greater Boston Television Corp.* v. *FCC*, 447 F.2d 841 (D.C. Cir. 1971), and Leventhal, *What the Court Expects of the Federal Lawyer*, 26 Fed. Bar J. 1 (Winter 1967). Fortunately, for some he gave a generous benefit of the doubt when fallible counsel did not fully measure up to his high ideals. *Contrast Radio Athens, Inc.* v. *FCC*, 401 F.2d 398 (D.C. Cir. 1968), and *Fidelity Television, Inc.* v. *FCC*, 515 F.2d 684 D.C. Cir. 1975), with the flintier *Fidelity Television Inc.* v. *FCC*, 502 F,2d 443 (D.C. Cir. 1974).

His admonitions were designed to check the type of adversarial and administrative zealotry which in the past has concerned this Board. See *e. g. Millard Orick, Jr.*, 89 FCC 2d 571, 572-573 n. 1 (Rev. Bd. 1982), and numerous cases cited therein. Whether the Decision in this case is an overreaction to minor derelictions is a question which may ultimately have to be resolved by higher authorities.

Nor does this case resemble *Paradise Broadcasting and Communications*, FCC 85R-16, Feb. 13, 1985, which involved another 100% minority and might give rise to reasonable doubts among reasonable men if judged by Judge Leventhal's clear and convincing standard.

FCC 84D-61

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Broadcast Associates of Colorado, A Limited Partnership Lamar, Colorado	MM Docket No. 83-1218 File No. BPH-821209AC
FM 105, Inc. Lamar, Colorado	MM Docket No. 83-1219 File No. BPH-830321AN
For a Construction Permit for a new FM Station	

Appearances

Richard Hildreth, Vincent J. Curtis, Jr. and *Robert A. DePont* on behalf of Broadcast Associates of Colorado; and *Gene A. Bechtel, Harry F. Cole* and *Ann C. Farhat* on behalf of FM 105, Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOHN H. CONLIN

Issued: August 28, 1984; Released: August 31, 1984

Preliminary Statement

1. Broadcast Associates of Colorado (Associates) and FM 105, Inc. (FM 105) filed mutually exclusive applications for a construction permit for a new FM broadcast station on Channel 289C in Lamar, Colorado. By order released November 8, 1983, the following issues were designated for hearing:

(1) To determine whether there is a reasonable possibility that the tower height and location proposed by the applicants would constitute a hazard to air navigation.

(2) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(3) To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

The air hazard issue was summarily resolved in favor of the applicants on the basis of amendments submitted after the case was designated for hearing. Tr. 8-9, 18-19. Thus, only the comparative issue remains.

2. A prehearing conference was held on January 13, 1984 and the evidentiary hearing session was held on March 23, 1984. Proposed findings of fact and conclusions were filed by the applicants on June 11, 1984 and replies were submitted on June 29, 1984.

Findings of Fact

Associates

3. Associates is a limited partnership consisting of Don N. Yoxsimer (general partner with approximately 57% ownership interest) and a corporation, High Plains Broadcasters, Inc. (limited partner with approximately 43% ownership interest). Mr. Yoxsimer is also president, director and approximately 7% stockholder of the limited partner corporation, which has some twenty other individuals who are stockholders, three of whom are also directors and/or officers. Mr. Yoxsimer has no interest in any medium of mass communications.

4. *Integration of Ownership with Management*. Mr. Yoxsimer plans to devote full time (at least 40 hours per week) to the position of general manager of the proposed FM station. He will oversee construction and day-to-day operations including programming, sales, news and public affairs presentations, personnel and EEO matters, finances and administration. He will resign his present employment position as a computer operator to assume these duties.

5. From 1973 to 1978 Mr. Yoxsimer attended, College of the Desert, Palm Desert, California, and San Francisco State University, majoring in broadcast communications arts. He received distinctive achievement awards at College of the Desert and was graduated magna cum laude at San Francisco State University. From 1973 to 1975 while attending college he served an internship at KREO(AM), Indio, California, working in news, sales, production and announcing. He was also executive producer of the campus television station in his senior year at San Francisco State. After graduation, from April 1979 until early 1982, Mr. Yoxsimer was employed at KLMR-AM-FM in Lamar, Colorado as a salesman. He performed a variety of other duties including remote broadcasts, news reporting, commercial production and co-hosting a talk program. When the sales department was separated into AM and FM divisions he was placed in charge of FM sales. Mr. Yoxsimer resigned from KLMR May 1982, and has since been employed as a computer operator.

6. Mr. Yoxsimer has been a resident of Lamar approximately eleven years; from 1968 to 1973 and from 1978 to date. As civic activities Mr. Yoxsimer testified that (a) in 1981 he was Master of Ceremonies for the

Lamar area Special Olympics; (b) he covered such community events as the "Hay Day" celebration in Wiley and (c) he spoke before the Lamar Noon Lion's Club on the topic of firearms responsibility and safety.[1]

7. Mr. Yoxsimer is married, and has one child. His spouse is employed part-time as a nurse. Mr. Yoxsimer is severely limited in the types of employment that he can pursue because of a disability which places him in the category of "physically handicapped." The disability stems from an injury that he sustained in an automobile accident in September of 1970 which resulted in a condition that has medically classified him as an "incomplete quadriplegic." He was confined to a wheelchair between 1970 and 1973, but as a result of a lengthy rehabilitation process, he has lessened his dependence on the wheelchair and is able to get about by utilizing forearm crutches and leg braces. In addition to his interest in broadcasting generally, Mr. Yoxsimer's physical handicap was one of the factors which led him to pursue a career in broadcasting because it was an endeavor in which his disability would not be so limiting.

8. *Auxiliary Power*. Associates proposes auxiliary power facilities to be used in the event of interruption of the station's normal electrical power supply.

FM 105

9. FM 105 is a corporation whose sole stockholder, officer and director is Clara Ines Oxley. Local counsel in Lamar serves as acting secretary of the corporation, but has no ownership interest. Mrs. Oxley has no interest in any medium of mass communications.

10. *Integration of Ownership with Management*. Mrs. Oxley plans to devote full time to the position of general manager of the proposed FM station. She will oversee construction and day-to-day operations including sales, news, community relations, EEO matters, bookkeeping and payroll. FM 105 Ex. 1, p. 4; Tr. 60-62, 71-73, 76-77. Mrs. Oxley does not have broadcast experience, except with respect to the purchase of advertising and the production of political spot announcements. Tr. 60-61. She plans to hire an assistant who will have broadcast operating experience. Tr. 61-62.

11. Mrs. Oxley was born in Colombia, South America. FM 105 Ex. 1, p. 1. She is Hispanic, her ethnic heritage being part Spanish and part Indian. *Id.*; Tr. 28-30, 144-45. She attended high school and an upper level education institution in Colombia, receiving a degree in business in 1963.

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[1] Associates points out that Mr. Yoxsimer's involvement in civic activities also included production of live remote broadcasts of charitable and cultural events in Lamar, production of programs highlighting activities in southeast Colorado, reporting on Lamar school board meetings and Lamar Chamber of Commerce activities, and his broadcasts of local high school sports events. These activities, however, were undertaken as part of his employment at KLMR and are more properly a part of his broadcast experience rather than civic record.

Id., pp. 1-2, Tr. 89. From 1964 to 1968 she held a secretarial, bookkeeping and administrative position as assistant to the president of a brokerage firm in Colombia. *Id.*, p. 2. Mrs. Oxley moved to the United States in 1969 and became a naturalized citizen in 1975. *Id.*, pp. 2-3.

12. From 1970 to 1974 she was employed in her husband's grocery store in Wiley, Colorado (which is about 10 miles from Lamar) and, from 1978-1980 she was employed as manager of the Prowers (Colorado) County medicaid program which provided medical treatment for underprivileged children. *Id.*, pp. 2-3.

13. In 1980 Mrs. Oxley opened a retail clothing store in Lamar, named Jolie Fashions. FM 105, Ex. 1, p. 3. She is the owner and day-to-day manager of this business, which has three part-time employees. *Id.* Mrs. Oxley personally rented space and worked in the initial establishment of the store, including painting, furnishing, installation of clothing racks, etc.; she makes buying trips to Denver and other locations to purchase inventory; she oversees the work of the employees, and attends to bookkeeping, payroll, payment of taxes, banking and the like. *Id.*; Tr. 63, 65-69, 148-49. Mrs. Oxley had no previous experience in this business and used the services of a person with experience in the retail clothing store business to help her get started. Tr. 148-49. Mrs. Oxley plans to sell Jolie Fashions in the event FM 105 is awarded the radio station permit. FM 105 Ex. 1, pp. 3-4; Tr. 60, 63-65.

14. Mrs. Oxley lives in Wiley, which is ten miles from Lamar. FM 105 Ex. 1, p. 1; Tr. 144. She has lived in the area since 1970. *Id.*; Tr. 27. In addition to her employment in the local county medicaid program for underprivileged children, para. 12, *supra*, Mrs. Oxley has had other civic involvement including the following: Prowers County Republican Party (member since 1975 and active in voter registration, officer of Central Committee, attendance at conventions, dating back to 1977) (FM 105 Ex. 1, p. 4); Southeast Colorado Mental Health Center in Lamar (advisor during period 1979-early 1980 when the organization was active, appointed by the Board of Commissioners to represent Prowers County minorities (FM 105 Ex. 1, p. 4; Tr. 130-132, 136); Lamar Chamber of Commerce including the Chamber's Retail Trades Committee since 1980 (FM 105, Ex. 1, p. 4; Tr. 142-143). In recent years, Mrs. Oxley has been a member of or has participated in activities of Health Resources, Inc. (health and hospital programs for elderly), the Wiley chapter of the Federated Womens Club and the local chapter of Zonta International. FM 105 Ex. 1, p. 4; Tr. 125-130, 138-142, 155-156.

15. Mrs. Oxley is married and has two children. Her spouse is co-owner of a grocery store in Wiley and is employed there.

16. *Auxiliary Power*. FM 105 proposes auxiliary power facilities to be used in the event of interruption of the station's normal electrical power supply, FM 105 Ex. 3.

17. *Other Matters*. Prior to and subsequent to the hearing Associates contended that statements made by Clara Oxley during the course of the proceeding raised questions regarding the certification of her application and possible misrepresentation. See FCC 84M-568, released February 2, 1984; FCC 84M-2372, released May 21, 1984, FCC 84M-2373, released May 21, 1984. Though no special issues were added, the presiding officer indicated that these matters, on which the evidence was already in the record, could be addressed in the proposed findings and conclusions.

18. Clara Oxley signed her application in Lamar, Colorado on March 17, 1983 and mailed it to her attorney in Washington, D.C. (Associates Ex. 6). It is undisputed that at the time she did not have before her the engineering portion of the application, which was simultaneously being prepared in Washington, D.C. by her consulting engineering firm. The engineering data is dated March 17, 1983 and is signed by a member of the firm of Smith and Powstenko (Associates Ex. 5). It was delivered to Mrs. Oxley's Washington attorney on March 21 (Tr. 86). On the same day, the entire application was filed with the FCC. In light of these circumstances Associates contends, and it is hereby found, that the FM 105 application was improperly certified, in that since Mrs. Oxley, while attesting that the information contained therein was true and correct to the best of her knowledge and belief, had not reviewed and approved the engineering data in the application.[2]

19. Clara Oxley's written testimony (FM 105 Ex. 1) contained several inaccuracies regarding her civic participation: Her statement represents that she has been an advisor to the Southeast Colorado Mental Health Center since 1979 (FM 105 Ex. 1, p. 4). Her testimony on cross-examination was that she participated in the organization in 1979 and early 1980; but thereafter the group appeared to lose its enthusiasm, she was not contacted about further meetings, and does not know whether it still exists (Tr. 131-132). Her written testimony also states that since 1979 she has been a member of Health Resources, Inc., whereas on cross-examination she stated that she is not presently a member (Tr. 126). It appears, however, that "membership" is a subjective concept and that as recently as 1983 she participated in activities of the organization (Tr. 129-130). Her written testimony also stated that she was a member of Zonta International and the Federated Women's Clubs. At the hearing she testified that she had resigned from Zonta in the fall of 1983 (Tr. 127-128) and had become a non-active member of the Federated Women's Clubs in 1980 after four years of participation in the organization (Tr. 133-134). On

[2] There is no claim that the engineering data itself contained any errors or misstatements.

balance, these minor inaccuracies in Mrs. Oxley's written testimony are inconsequential. At issue is simply the dates of certain of her civic affiliations, not the affiliations themselves, and in each instance her oral testimony was candid and direct regarding the nature and extent of her relationship with the groups in question. Indeed it appears that the discrepancies stem from assumptions made by counsel during the preparation of the exhibit, since a written statement by Mrs. Oxley, on which the exhibit was based, made no claim to *current* membership in Zonta, Federated Women's Clubs or Southeast Colorado Mental Health Center. FM 105 Ex. 4.

20. Associates also asserts that there are misstatements or inconsistencies in Mrs. Oxley's statements regarding her transmitter site and her auxiliary power proposal. With respect to the transmitter site, Mrs. Oxley testified that she was aware of the existence of another application but did not know that it was Associates' (Tr. 44-46, 50). Associates contends that in an opposition to a petition to enlarge issues,[3] Mrs. Oxley had submitted an affidavit indicating that she was aware of Associates' application when she was searching for a transmitter site. This contention is baseless; the affidavits submitted with the opposition pleading make no reference to Associates in connection with the transmitter site question. The pleading itself, written long after the events in question, refers to the existence of another application "presumably that of Associates." However, there is no contradiction in Mrs. Oxley's statements; and even if there were, there is no evidence whatsoever of deliberate misrepresentation.

21. Mrs. Oxley's testimony concerning the auxiliary power proposal of FM 105 is set forth at Tr. 80-82; 119-121. Mrs. Oxley testified that she shared in the idea for auxiliary power facilities, an idea that was also suggested by the engineers and attorneys, based upon her knowledge of the value of such facilities in this remote area. While counsel on cross-examination tried to create an inconsistency between the testimony of Mrs. Oxley at her deposition and at the hearing concerning which person first originated the idea (Tr. 120), the record does not clearly establish that any such inconsistency exists, and even if it did, this does not support Associates's claim of material or willful misrepresentation.

22. Finally, Associates points to an admittedly erroneous statement by Mrs. Oxley in her deposition as to how she came to obtain her present counsel. Asked who had referred her to Mr. Gene Bechtel, she stated that friends from Colombia had done so, when this was not the case. In fact it was a friend of her father-in-law who had suggested she contact Mr. Bechtel. On the day before the hearing she conferred personally with Mr. Bechtel for the first time and discussed with him her earlier statement. He

[3] FM 105's opposition to petition to enlarge issues filed January 4, 1984.

advised counsel for Associates that her statement at the deposition was not accurate and provided the correct information. See Tr. 33-38; 145-146.

23. Mrs. Oxley attributed her answer at the deposition to her state of mind at the time. She explained that she was suffering from fatigue and emotional distress, having returned the night before from a visit with her family in South America during which an infant niece had suddenly died. In addition she had no opportunity to discuss the deposition with her communications counsel (who was not present) and felt flustered and intimidated by her surroundings (Tr. 34-35).

Conclusions

24. Neither applicant has any ownership interest in other media of mass communications. Accordingly, there is no basis for a comparative advantage or disadvantage under the Commission's diversification policies. Both applicants propose auxiliary power facilities, so there is no basis for a distinction with regard to this relatively minor comparative factor. Thus, the comparative choice turns largely upon the respective proposals for integration of ownership with management.

25. Quantitatively the applicants are equal, with Mr. Yoxsimer, Associates' general partner, proposing to serve full time as general manager of the proposed station and Mrs. Oxley, FM 105's sole stockholder, proposing to work full time in the same capacity. Associates questions the credibility of Mrs. Oxley's commitment, but its arguments rest largely on speculation and innuendo regarding her capabilities. By Associates own admission (Reply, para. 84), Mrs. Oxley established, owns and operates "a highly successful . . . business in Lamar." Though she has no experience in broadcasting, this provides no basis for believing as, Associates contends, that her role at the station will necessarily be a passive one; her business background strongly suggests the contrary. Likewise the record clearly shows that she intends to dispose of her present business and transfer her energies to the operation of the broadcast station. Since there is no difference in the applicants' quantitative integration, any preference depends on differences in qualitative factors.

26. At the outset two legal and/or policy arguments advanced by Associates will be briefly addressed. Mr. Yoxsimer is physically handicapped, having suffered an injury which left him an "incomplete quadriplegic" with limitations on his mobility. Associates argues that because of this disability, he is entitled to a preference similar to those accorded minorities and women in comparative broadcast proceedings. Associates also contends that Mrs. Oxley, who is Hispanic, is not entitled to the minority preference ordinarily granted to individuals of her ethnic heritage because it has not been demonstrated that she is disadvantaged or a victim of discrimination. Though these arguments have been

skillfully briefed, they are unsupported by Commission precedent of any kind. Indeed the Review Board in *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 955 (1982) held that it was beyond the Board's authority to create an enhancement credit for handicapped individuals. As to minorities, the limitation on the preference Associates seeks to impose is totally at odds with the Commission's implementation of its policy toward minority applicants.[4] Arguments for changing these policies should be addressed to another forum.

27. Turning to those qualitative elements that have been recognized as enhancing an applicants' integration proposal, both applicants are local residents. Mr. Yoxsimer has lived in Lamar since 1968, except for the years 1973-1978 when he was attending college in California. Mrs. Oxley has lived in the area continuously since 1970. Her residence has been in the nearby community of Wiley but since 1980 she has been in Lamar on a day-to-day basis managing her store. She has been a member of various local and area civic organizations, e.g., Southeastern Colorado Mental Health Center (located in Lamar), Lamar Chamber of Commerce, Hĕalth Resources, Inc., Federated Women's Clubs (Wiley) and Zonta International. Mr. Yoxsimer so far as the record shows has no civic affiliations, but was master of ceremonies at the Special Olympic's for the Lamar area, and a speaker at a Lion's Club function. In addition Mr. Yoxsimer has nearly three years of broadcast experience at KLMR(AM and FM) in Lamar, where he was employed basically as a salesman but was utilized in a variety of other positions which broadened his experience and also his familiarity with the community. In addition, Mr. Yoxsimer obtained valuable training and experience in broadcasting while in college.

28. On balance the presiding officer sees no basis for drawing a distinction between the applicants in terms of local residence.[5] FM 105 is entitled to a preference for Mrs. Oxley's stronger record of civic participation and Associates is entitled to a preference of equal weight for Mr. Yoxsimer's broadcast experience.

29. The decisive factor in weighing the quality of integration proposed is Mrs. Oxley's status as a woman and as a member of a minority, in this case Hispanic. Associates does not dispute her gender, but argues that since her ancestry is to a considerable extent South American Indian, as well as Hispanic, her claim to a minority preference is dubious. This

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[4] See, e.g., *Waters Broadcasting Corp.*, 91 FCC 2d 1260, (1982), *aff'd sub nom. West Michigan Broadcasting Company* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984); *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978); *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

[5] While Mrs. Oxley resides in Wiley rather than Lamar, the proximity of the two communities, the fact that her business is located in Lamar, and that her civic affiliations are in Lamar as well as Wiley blurs any distinction which otherwise might be drawn between residence in the community of license and residence in the service area.

argument is rejected; Mrs. Oxley falls squarely within the governing definition of a Hispanic minority established by OMB and employed by the FCC and other federal agencies:

> A person of Mexican, Puerto Rican, Cuban, Central and South American or other Spanish culture or origin, regardless of race.[6]

FM 105's application is thus substantially enhanced because its sole owner, who will be integrated fulltime in the operation of the proposed station, is a Hispanic female. *Minority Ownership of Broadcasting Facilities, supra; Horne Industries, Inc.*, FCC 84-286, released July 20, 1984. Since this is the only decisionally significant difference between the integration proposals of the applicants, FM 105 is entitled to a distinct preference under the integration criterion.

30. Associates has raised several other matters which, it argues, bear upon Mrs. Oxley's qualifications (paras. 17-23 supra). One which the presiding officer finds somewhat detrimental to FM 105's case relates to the manner in which its application was certified. On the basis of the record it must be concluded that Mrs. Oxley did not have the engineering portion of the application before her when she signed the application on March 17, 1983. The engineering data was signed in Washington on the same day (a Thursday) by a member of a consulting engineering firm and was delivered to the office of Washington legal counsel on the following Monday. Counsel apparently attached it to the rest of the application, which had been received from Mrs. Oxley, and immediately filed it with the Commission.

31. In mitigation it should be noted that the information not covered by Mrs. Oxley's certification was correct, that there is no evidence of bad faith on her part, that she appeared to be acting in accordance with her counsel's guidance and instruction, and that her testimony on the matter was at all times direct and candid. Since the application was improperly certified, FM 105 will receive a demerit; but in the circumstances its effect on the applicants' overall qualifications is relatively minor. See *WEBR, Inc.* v. *FCC*, 420 F.2d 158, 167-168 (D.C. Cir. 1969); *WIOO, Inc.*, 95 FCC 2d 974, 990-991 (1983).

32. Associates' other allegations relate to misrepresentation and for the most part bring to mind a recent reference by the Review Board regarding "the unfortunate tendency of applicants to pursue misrepresentation and lack of candor issues with excessive zeal." *WHW Enterprises, Inc.*, 89 FCC 2d 799, 805 (1982). Regarding alleged inconsistencies in Mrs. Oxley's affidavit and testimony about a transmitter site, the presiding officer concludes that no inconsistency exists. The charge of misrepresen-

[6] *OMB Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting*. See also H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 45 (1982).

tation regarding FM 105's auxiliary power proposal relates to non-decisional trivia, i.e. who first suggested the proposal, and is not, in any event, supported by the record. The mistakes in Mrs. Oxley's written direct case regarding the dates of her affiliations with several civic organizations are the kind of inaccuracies that frequently occur in comparative proceedings; they are distinguished here only by the vigor with which Associates has pursued the matter. The errors, which appear to have occurred when counsel was putting the statement in final form, were readily acknowledged and corrected in Mrs. Oxley's forthright answers on cross-examination, and the presiding officer views the matter as being entirely inconsequential.

33. Finally, there is the matter of Mrs. Oxley's deposition testimony regarding her retention of counsel. At the hearing she readily conceded that her statement at the deposition was inaccurate and offered an explanation for her prior statement. Obviously, her behavior in this matter cannot be condoned. On the other hand, it seems evident that at the time of the deposition she was, quite understandably, fatigued and under considerable emotional strain as a result of the circumstances described in her testimony (para. 23, supra). This does not excuse her action; it does, however, suggest that it was the product of a spontaneous misjudgment made under trying circumstances, rather than a calculated effort to deceive.[7] Significant also is the fact that the misstatement was voluntarily corrected by the applicant prior to the hearing. For these reasons the presiding officer concludes that the incident is not of such significance as to warrant a demerit.

34. In sum, FM 105 has been awarded a preference for integration because of the qualitative superiority of its proposal (100% ownership by a Hispanic female), and has received a slight demerit for the manner in which its application was certified. Associates has received no preferences. FM 105's demerit is not of sufficient weight to offset its integration preference. Thus, the public interest would be better served by a grant of the FM 105 application.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Broadcast Associates of Colorado IS DENIED and the application of FM 105, Inc. IS GRANTED.[8]

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[7] See *Fox River Broadcasting Inc.*, 93 FCC 2d 127, 129 (1983); *West Jersey Broadcasting Company*, 90 FCC 2d 363, 370 (Rev. Bd. 1982).

[8] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

FEDERAL COMMUNICATIONS COMMISSION

JOHN H. CONLIN, *Administrative Law Judge*

Cellular Communications Systems
Comparative Criteria
Comparative Hearing
Mobile Radio Service, Cellular Applications

Initial Decision affirmed granting nonwireline cellular application where one applicant's proposed system covers more area and population, its identification and analysis of demand was more reliable, and its proposed system will retain greater flexibility to expand in response to increasing demand overcomes opponent's slight preference for its usage sensitive rate structure (not rate levels).
—*Celcom Communications Corp.*
CC Docket No. 83-101

FCC 84-504

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	CC Docket No. 83-101
Celcom Communications Corporation	File No. 26159-CL-P-(22)-82
Cellular Telephone Company	File No. 26126-CL-P-(49)-82
Cellular Mobile Corp.	File No. 26165-CL-P-(66)-82
For a construction permit to establish a new cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the New York, New York, modified Standard Metropolitan Statistical Area	

Appearances

S. WILLIAM LIVINGSTON, JR. ON BEHALF OF CELCOM COMMUNICATIONS CORPORATION; *BEN C. FISHER* ON BEHALF OF CELLULAR TELEPHONE COMPANY; *WILLIAM K. KEANE* ON BEHALF OF CELLULAR MOBILE CORP.; AND *GIOVANNA M. LONGO* ON BEHALF OF THE SEPARATED TRIAL STAFF, COMMON CARRIER BUREAU, FEDERAL COMMUNICATIONS COMMISSION.

FINAL DECISION

Adopted October 29, 1984; Released October 31, 1984

BY THE COMMISSION: COMMISSIONERS QUELLO AND DAWSON CONCURRING IN THE RESULT.

I. Background

1. In this proceeding, the captioned applicants have filed exceptions to the Initial Decision of Administrative Law Judge Frederic J. Coufal. *Celcom Communications Corporation*, FCC 84D-15, released March 2, 1984. The *Initial Decision* (I.D.) granted the application of Cellular Telephone Company (CTC)[1] and denied the mutually exclusive applications of Celcom Communications Corporation (Celcom) and Cellular Mobile Corp. (CMC). The judge found that CTC's application was superior to the applications of CMC and Celcom under Issues (a) and (b) (see para. 2, *infra*). The preferences accorded to CTC under these two issues outweighed preferences given to CMS under Issue (c) for its proposal concerning rates and charges and under Issue (a) for its proposed service to roamers. The judge therefore concluded that the public interest, convenience and necessity would best be served by the grant of CTC's application. For the reasons stated below, we affirm the *I.D.*, with modifications, and we affirm the grant of CTC's application. Except as otherwise noted, the Findings of Fact and Conclusions of Law of the *I.D.* are incorporated herein by reference.

2. On February 18, 1983, the Chief, Common Carrier Bureau, acting pursuant to delegated authority, designated the captioned applications (and that of Lin Cellular Communications Corporation) for hearing on the following issues:[2]

> (a) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;

[1] CTC is a joint venture between Cellular Systems, Inc. (CSI) (50%), Lin Cellular Communications Corporation (45%) and Metromedia, Inc. (5%). CSI and Lin merged to form CTC on March 18, 1983 with the CSI application designated as the surviving application. The merger was approved by *Memorandum Opinion and Order*, FCC 83M-2261, released July 13, 1983.

[2] Advanced Mobile Phone Service, Inc. (New York Designation Order), 53 RR 2d 349 (Com. Car. Bur. 1983). A financial issue, "Issue (a)" in the Designation Order, was designated against Lin. This issue was resolved favorably to Lin by *Memorandum Opinion and Order*, FCC 83M-1398 released April 29, 1983, and is therefore no longer relevant. For purposes of clarity and consistency with our other cellular decisions we have redesignated the remaining issues (a)-(d).

(b) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service;

(c) To determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and

(d) To determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.

The Separated Trial Staff (STS) of the Common Carrier Bureau was also made a party to the proceeding.

3. Pursuant to the special expedited procedures for cellular applications in the top 30 markets,[3] the applicants filed their written direct cases with their applications on June 7, 1982. Rebuttal testimony was filed on May 18, 1983. A hearing session was held on September 13 and 14, 1983 at which rulings were made on objections, and offers of exhibits and requests for cross-examination were made. The record was closed by *Order*, FCC 83M-3931, released November 1, 1983. The parties filed their Proposed Findings of Fact and Conclusions of Law on December 1, 1983 and their Reply Findings on December 30, 1983.

4. CTC received preferences under sub-issues within Issue (a) for its proposed coverage of geographic area and population and its studies to determine relative demand, and a slight preference for its ability to accommodate demand for local service. CMC received a "moderate" preference for its proposed service to roamers. After evaluating the individual preferences for these sub-issues, the judge awarded CTC a substantial preference under Issue (a) overall. CTC was also awarded a preference under Issue (b) for its proposal concerning system expansion while CMC received a preference under Issue (c) for its proposed rates and charges. No other preferences were awarded. Accordingly, the judge found CTC's proposal superior to those of CMC and Celcom.

5. On April 2, 1984, CMC and Celcom filed their exceptions to the *I.D.* and CTC filed a brief in support of the *I.D.* and limited exceptions. The three applicants and the STS filed reply exceptions on April 24, 1984. CMC and Celcom both filed motions requesting that the Commission hold oral argument in this proceeding. These motions were opposed by CTC. The Common Carrier Bureau, acting pursuant to delegated authority, denied these motions. *Celcom Communications Corporation*, Mimeo 4627, released June 4, 1984.

[3] Cellular Communications Systems, 89 FCC 2d 58, 87-91 (1982). *See also* 47 CFR § 22.916(b)(1).

II. Issue (a)

6. Issue (a) calls for a comparison of the geographic area and population the applicants propose to serve, the relative demand for service and the applicants' ability to accommodate demand for both local and roamer service.[4] *See Rogers Radiocall, Inc.* (*Chicago Final Decision*), FCC 84-62, released March 6, 1984, at para. 8, *recon. denied*, Chicago Reconsideration Order, FCC 84-370 released August 3, 1984; *MCI Cellular Telephone Company* (*Pittsburgh Final Decision*), FCC 84-61, released March 6, 1984, at para. 9, *recon. denied*, Pittsburgh Reconsideration Order, FCC 84-369, released August 3, 1984.

7. *Geographic Area and Population.* The judge found that the New York modified Metropolitan Statistical Area (MSA) encompasses a total dry land area of 3,818 square miles in 17 counties in the states of New York and New Jersey and had a total population, as of 1980, of 14,696,685. The areas and population proposed to be served by the applicants are represented in the following table.

	Geographic Area Served[5]			*Population*	
CTC	3,491	mi^2	91.4%	14,557,028	99.0%
CMC	2,847.5	mi^2	74.6%	14,275,177	97.1%
Celcom	2,719	mi^2	71.2%	13,853,291	94.3%

I.D., para. 7-8.

8. Judge Coufal also found that two of the applicants — CTC and CMC — would have coverage "pockets," *i.e.*, areas that only one applicant proposed to serve. CTC proposes to serve five pockets of exclusive coverage with a total area of 794.4 square miles and a total population of 343,812. CTC's pockets contain portions of various highways and include concentrations of high income households as well as commercial and industrial activity. *I.D.*, para. 9. CMC proposes to serve two pockets having a total area of 61.0 square miles and a total population of 28,876.[6] CMC's larger pocket is mostly residential and is traversed by three state highways. *I.D.*, para. 10. Celcom has no pockets of exclusive coverage

[4] In Cellular Communications Systems, 86 FCC 2d 469, 502 (1981), we stated that the geographic area that an applicant proposed to serve would be a major basis of comparison. We also noted that "the presence of densely populated regions, highways, and areas likely to have high mobile usage characteristics as well as indications of a substantial public need, including the results of public need surveys" would be significant factors to consider.

[5] For purposes of comparison, the geographic area served is that area within the applicant's composite 39 dBu contours within the MSA. The percentages given are of the total area and population of the New York modified MSA.

[6] One of CMC's pockets is a 1.2 square mile area of Robert Moses State Park on Fire Island. This pocket has no residential population but is a "seasonally heavy recreational area." The Robert Moses Causeway, which connects Fire Island with Long Island, is said to be "frequently at capacity levels." CMC Rebuttal Exhibit II, p. 5.

and, in fact, fails to cover a number of other areas covered by both CTC and CMC. *I.D.*, para. 11. In addition, both CMC and Celcom have interior cells that are isolated and all three applicants will have cells that are not completely connected by 39 dBu contour overlap. The judge specifically found that this creates internal gaps in coverage and that subscribers would experience unreliable service and handoff in these gaps. The highway mileage in CTC's gap was found to be 1.0 miles while CMC and Celcom were found to have 12 and 40.25 highway-miles in their gaps, respectively. *I.D.*, paras, 12-13.

9. Judge Coufal concluded, based upon a comparison of the area and population each applicant proposed to serve, that CTC's proposal was superior and merited a preference. The judge concluded that although CTC's pockets would have a lower level of demand than central areas of the MSA covered by all three applicants, the record supported CTC's conclusion that demand exists in these areas and should be accommodated. CTC was also found to be superior due to the coverage gaps in the other applicants' systems.

10. Both CMC and Celcom take exception to the preference awarded to CTC on this issue. Both argue that the quantitative differences in the applicants' coverage proposals are small and that CTC has not shown there will be any demand for cellular service in its pockets. Celcom also argues that CTC has proposed to build many unnecessary cells and that its coverage proposal is mere "application posturing." Celcom therefore concludes that no preference should be awarded on this basis or that, at most, the Commission's prior decisions warrant the grant of only a very slight preference. *Chicago Final Decision*, at paras. 9-14. CMC considers the applicants' coverage proposals quantitatively indistinguishable and concludes that it should be preferred for providing a higher quality of service.[7]

11. Celcom also excepts to the judge's conclusion that it will have internal coverage gaps that will result in unreliable service and handoff difficulties. Celcom notes that the Carey Report,[8] upon which the calculation of an applicant's 39 dBu contours is based, is unreliable and

[7] CMC submitted the results of a study conducted in Chicago by Motorola which attempts to quantify the typical path loss as a result of buildings using the Carey report. Motorola derived a value of 26 dB. CMC regards this evidence and a comparison of the applicants based thereon, as "highly probative" of the superior quality of its coverage proposal. This evidence was excluded by the judge and CMC excepts to this ruling.

[8] R.B. Carey, FCC Report No. R-6406, Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service. The 39 dBu contours projected using Carey cover the area of 90% reliability of service. The Commission has adopted Carey as the standard for determining reliable service areas. See Cellular Communications Systems, 86 FCC 2d at 508; Pittsburgh Reconsideration Order, *supra*, at para. 6.

inadequate to predict actual propagation effects and does not measure the ability of a system to effect handoff from one cell to another. Celcom also offers evidence to show that it would achieve 80% reliability of service in these areas.

12. CTC argues that the preference it received is fully supported by the record. CTC, in contrast to its opponents, considers the coverage differences dramatic. Indeed, CTC argues, for several reasons, that its preference in this area should be enhanced. CTC also believes that the judge was correct in finding that CMC and Celcom would have coverage gaps and in concluding that CMC's depth of coverage proposal does not merit comparative credit.

13. We affirm the judge's award of a preference to CTC. CTC has proposed to serve the greatest area and population of the three applicants. The coverage differences between CTC and its competitors are significant. In addition, CTC's coverage pockets contain numerous indicia of likely demand for cellular service.[9] Our conclusion that CTC's coverage is superior to CMC's and Celcom's is enhanced by the fact that CMC and Celcom's 39 dBu Carey contours indicate a likelihood that there will be significant gaps in their coverage, while CTC's coverage will have only minor gaps.[10] On this record CTC is entitled to a preference for its superior coverage of area and population.[11]

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[9] CTC's pockets contain significant areas of affluent suburbs. In addition, CTC's pockets contain numerous highways and commuter rail lines and stations as well as other areas likely to generate demand. *I.D.*, paras. 9 and 65.

[10] We recognize that Carey predicts coverage of 90 percent reliability on an average basis over a wide variety of terrain conditions, and that service may in fact be highly reliable beyond the 39 dBu contours, depending on particular terrain conditions; conversely, service may be unreliable even within the Carey contours because of local obstructions such as buildings, hills, or foliage. A cellular licensee may find it necessary to fine-tune its system by raising or lowering power, or by moving or adding cell-sites, to provide coverage that is reliable under actual conditions. Nevertheless, we have specified that the standard for *comparison* is the 39 dBu Carey contour. *See* note 8, supra. Therefore, Celcom's argument that it will have 80% reliable coverage in the gaps is technically irrelevant. Even so, Celcom's and CMC's gaps, which are as great as 5 miles, present a greater probability that coverage will be impaired than CTC's single 1-mile gap.

[11] Celcom's suggestion that we should compare the applicants' coverage proposals based on their proposed CGSA's amounts to a request for reconsideration of the designation order in this case. While there may be some merit in the notion of comparing CGSAs instead of theoretical 39 dBu contours, we do not believe that the public interest would be served by reopening this proceeding. Our comparison of 39 dBu contours based on the Carey Report in this case is both reasonable and consistent with our approach in all other cellular comparative cases. We must, however, reject as inappropriate CTC's use of Carey to project intra-system interference. As we stated in our Chicago Decision *supra*, small cell systems are "interference-limited" and "some degree of intra-system interference is to be expected in any maturing cellular system. Such interference can be managed effectively," however. Therefore, we will not penalize an applicant because its

14. On the other hand, we cannot accept Celcom's argument that it should be preferred on the basis of its contention that CTC and CMC proposed to build unnecessary cells. All three applicants have proposed *bona fide* cellular designs. Under these circumstances we will not penalize an applicant that has taken an approach to system design that is not universally accepted.[12] *Chicago Final Decision*, para. 41; *Pittsburgh Final Decision*, para. 40. Celcom attempts to prove that CTC's approach is wasteful but its arguments in this regard are simplistic and unrealistic.[13] Moreover, Celcom has submitted no evidence to support its assertion that CTC does not intend to build the system it has proposed and that its proposal is therefore mere "application posturing." While it is true, as Celcom observes, that the system proposed will likely be substantially modified when it is built, we expect these modifications to result from experience gained by the carrier since the application was filed and on an updated assessment of the needs of the market. Such modifications, *per se*, do not imply bad faith in the application process.[14]

15. *Relative Demand for Service.* The Designation Order also directed the judge "to determine and compare the relative demand for the services proposed" by the applicants. *New York Designation Order, supra* note 2, 53 RR 2, 349, 363. All three applicants forecasted the levels of demand they expected to serve. Their projections are set forth in the following table.

Year	*Celcom*[15]	*CTC*	*CMC*
Initial	—	6,000	9,961
2	—	9,500	23,169
3	—		39,706
4	22,500		52,946
5			66,133

system design exhibits intra-system interference. Id. at para. 40 and n. 35; *see also Pittsburgh Final Decision, supra*, para. 41.

[12] This is consistent with our policy of encouraging technical diversity in the design of cellular systems. 86 FCC 2d at 507.

[13] Celcom argues that, because a cell's 39 dBu Carey contour represents the cell's area of 90% reliable service, two cell coverage would represent 99% reliability of service and three cell coverage would represent 99.9% reliability of service, etc. Celcom concludes that anything more than three cell coverage is engineering overkill and notes that Lin and Metromedia, two CTC principals, have taken this position in the Philadelphia cellular proceeding (a fact of no relevance to this proceeding). This argument ignores real-world propagation characteristics and assumes, erroneously, that theoretical coverage can be equated with actual service. Celcom's argument is therefore rejected.

[14] Consistent with prior Commission decisions, we reject CMC's claim that it deserves a preference because of its "depth of coverage" cellular design which utilizes overlapping cells. *See* Chicago Final Decision, at para. 14; Pittsburgh Final Decision, at para. 42. To the extent that depth of coverage proves to be necessary, the record does not demonstrate that greater depth of coverage than that proposed by CTC will be necessary.

[15] The Celcom demand figure is dated from the grant of the applicant's construction permit. (Celcom Ex. 5, p. 2.)

(*I.D.*, at para. 16.)

16. CTC received a preference for its showing of the extent of demand for cellular service in the New York MSA. The judge concluded that Celcom applied a "common sense" approach which failed to provide sufficient basis for its estimates to make them creditable. The judge also concluded that CMC's surveys contained several deficiencies. Judge Coufal believed that CMC's basic assumptions were unsupported[16] and that as a result its sample groups were too limited. In addition, the judge concluded that CMC had not established a nexus between its surveys and the decision to categorize New York as a low usage market and that the need factor (in this case of 4.5 cellular units per 1,000 population) had no demonstrated basis. In contrast, Judge Coufal concluded that CTC had provided all of the information necessary to establish the reliability of its surveys and that its methodology was reasonable. The judge dismissed various criticisms of CTC's methodology as speculative and concluded that CTC had performed a reasonably reliable study on which a system could be designed. In addition, the judge concluded that CTC had demonstrated a relationship between its market research and its demand projections and also concluded that, to the extent criticisms of CTC's methodology have validity, they were not fatal to the conclusion that CTC's market study was reasonably reliable. Accordingly, CTC was found to be deserving of comparative credit. *I.D.*, paras. 69-72.

17. Both Celcom and CMC argue that CTC should not have been preferred on this issue. CMC contests the judge's conclusions that its assumptions are unfounded; that there was no nexus between its demand surveys and the three usage bands by which it categorized the top thirty MSA's; and that it had not explained how its demographic data were used to project usage models and distribute demand over time. CMC also argues that due process requires that it be given an opportunity to respond to these criticisms of its methodology and that we should therefore either disregard the judge's findings on this issue or remand the proceeding to allow CMC to introduce additional evidence. Finally, CMC contends that CTC's demand survey methodology is flawed in a number of respects and that the *I.D.* overlooked these flaws.

18. Celcom also argues that CTC's demand survey and distribution methodologies are flawed and that it, rather than CTC, should have received a preference in this area. In addition, Celcom argues that CTC's demand projections for New York are not credible in view of "inconsistent" projections made by CTC's principals, Metromedia and Lin, in other

[16] Specifically, the judge found CMS's assumptions that pager users and businesses would be the primary users of cellular to be unsupported.

markets. Celcom also argues that CTC's surveys played no role in the design of its system, noting that CTC selected its cell sites before the surveys were conducted. Finally, Celcom argues that the presiding judge erred in comparing each applicant's showing of the extend of demand.

19. The STS agrees with Celcom that CTC's demand surveys are not reliable due to the small number of positive responses received but concludes that CTC's methodology is still superior to Celcom's, which Celcom admits was not intended to be scientific. The STS also concludes that CTC's demand distribution methodology is reasonable and is adequately explained and therefore deserves a preference.

20. The presiding judge correctly concluded that CTC performed a reasonably reliable study of the New York market on which a cellular radio system could be designed. We therefore affirm the judge's conclusion, and grant of a preference to CTC on this sub-issue. Clearly, no attempt to project demand for a new service, such as cellular, can be expected to be perfect. However, CTC surveyed potential subscribers and questioned them on matters likely to affect their decision whether to subscribe.[17] CTC then projected demand over the relevant universe[18] and distributed the projected demand in a reasonable manner. We do not find CMC's criticisms of CTC's market research effort persuasive. In particular, we find that CTC's decision to exclude from its projections respondents who indicated that they would possibly subscribe is reasonable. We also find that CTC's projection of a 36% market share is reasonable. CMC contends that this is a serious underestimate but the record does not support CMC's position. *See I.D.*, paras. 21 and 72; CTC Exhibit 37, pp. 10, 14.

21. We also reject Celcom's arguments relating to this issue. Celcom has misstated the universe for CTC's samples. See n. 18, *supra.* Projections made by affiliates of CTC's principal owners in other markets are irrelevant here and therefore do not affect our judgment of the reliability of CTC's surveys. Nor do we agree with Celcom's assertion that CTC's market research played no role in its system design. As CTC has pointed out, although it did not base its cell site selections on its demand surveys, the channelization of its system was based on its overall demand projections and distribution. Furthermore, CTC's demand distribution methodology was a reasonable effort to account for the factors that are likely to be indicators of cellular demand. *See Chicago, supra*, para. 25.

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[17] These include the cost of service and preference for mobile or portable units.

[18] CTC surveyed businesses in the New York MSA for the business survey and households with annual incomes of $35,000 or more for the household survey. The universes for these surveys are therefore approximately 500,000 and 900,000 respectively, not 14,000,000 as Celcom implies.

22. Both Celcom's and CMC's market research contain serious flaws. We affirm the presiding judge'c conclusion that Celcom failed to provide sufficient basis for its estimates to make them creditable. *I.D.*, para. 70; *see also Pittsburgh Final Decision, supra*, para. 21. Similarly, CMC has not established, nor does the record demonstrate, the reasonableness of its underlying assumptions. We reaffirm our analysis of CMC's market research, which was identical in all of the thirty largest MSA's, and which we have already found to be deficient in earlier proceedings. *See Chicago, supra*, para. 26; *Pittsburgh, supra*, para. 21; *American Mobile Communications of Washington and Oregon (Seattle Final Decision)*, FCC 84-368, released August 8, 1984, para. 22. CMC had adequate notice of the bases of comparison in this proceeding and has received a fair hearing. *Chicago Reconsideration Order, supra*, para. 10. Overall, CTC performed a more reliable analysis of the extent and distribution of demand than Celcom or CMC and used its analysis of demand in designing its system. We therefore affirm the judge's award of a preference to CTC on this sub-issue.

23. *Ability to Accommodate Local Demand.* The judge awarded CTC a slight preference for its ability to accommodate local demand. CTC's proposal was favorably regarded because the judge found that, while all of the applicants' proposal has flaws, CTC's were less serious than Celcom's or CMC's. Specifically, the judge concluded that although Celcom had demonstrated its ability to accommodate its projected demand for year four, it had not submitted a channel plan for year one. Accordingly, it could not be credited with ability to accommodate initial demand. In addition, Celcom's design contains numerous coverage gaps. The judge concluded that these gaps made it likely that subscribers using highways in these gaps would experience significant disruptions in service. *I.D.*, para. 73, The judge concluded that, although CMC had demonstrated its ability to accommodate first year demand, it had violated its design standards for interference-free operation and therefore was likely to have extensive intrasystem interference. The judge also concluded that CMC had not shown how its greater cell overlap — which comes only in areas covered by 5, 6 or 7 cells — improves coverage or that it covers any important areas that CTC does not. Finally, the judge concluded that an isolated cell in CMC's system in New Jersey would cause hand-off problems on portions of major highways. *I.D.*, para. 74.

24. The judge found that the "difficulties in CTC's system are serious but on a far lesser scale than those present in the Celcom and CMC systems." *I.D.*, at para. 75. For example, the judge concluded that CTC would suffer some intrasystem interference but that this is far less than the interference CMC will experience. In addition, although four of CTC's cells are underchannelized to meet the demand projected for them at

CTC's design grade of service, the presiding judge concluded that this problem could be rectified by the addition of one channel at each of these cells and was therefore not as serious as the other applicants' defects. The judge also found CTC's highway coverage to be superior because it encounters no significant handoff problems. *I.D.*, para. 75.

25. Both Celcom and CMC argue that they should have been preferred under this sub-issue. Celcom denies that its system's ability to accommodate first year demand is deficient and that subscribers in its system will experience difficulties in hand-off. Celcom states that the fourth year after grant of a construction permit would be the first year of operations for CTC and CMC if they used the full three year term of the construction permit to construct their systems. Celcom therefore argues that the *I.D.* erroneously faults it for not giving numbers of subscribers or channels per cell in the first year after grant.[19] Celcom also argues that conclusions concerning reliability of handoff in its system should not be based on measurements of its 39 dBu coverage contours made using the Carey method. In addition, Celcom argues that CTC should not receive a preference for its ability to accommodate local demand. Celcom notes that the preference awarded CTC is based on different grounds than similar preferences awarded in the Chicago and Pittsburgh cellular proceedings. Finally, Celcom argues that its system design is more efficient and flexible than either CTC's or CMC's and that it should therefore be preferred for its ability to accommodate demand.

26. CMC argues that it should receive a preference for its ability to accommodate demand. CMC notes that it has proposed an initial grade of service of .01 while CTC and Celcom have proposed grades of service of .02 and .05 respectively.[20] CMC also takes exception to the conclusion that its system will suffer from intrasystem interference and disputes the conclusion that gaps in its 39 dBu coverage contours will cause handoff difficulties.[21] CMC contends that its system design has advantages that merit a preference. Specifically, CMC reiterates its claim that depth of coverage system design enhances service reliability and asserts that it has concentrated a high percentage of its voice channels in what it considers

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[19] Celcom apparently means to imply by this line of reasoning that *its* first year of operations would be the fourth year after grant. This conclusion is obviously not supported by the record. *See I.D.*, para. 16; Celcom Exhibit 5, p. 2. Moreover, we can conceive of no reason why any carrier would delay the commencement of service to the public for so long, especially in view of the early entry of the wireline carrier into the New York market.

[20] Grade of service is a measure of the probability that a call offered to a group of trunks or circuits will fail to find an idle circuit at the first attempt. All three applicants used the Erlang B traffic tables in computing grade of service and assumed a traffic load of 0.026 erlangs per subscriber.

[21] CMC contends that reliable service will extend to a carrier's 22 dBu contours.

likely high demand areas.[22] Finally, CMC argues that it should be preferred for its technical expertise, which it asserts is greater than CTC's or Celcom's.

27. CTC argues that the preference it received is fully supported by the record. CTC also contends that defects in the other applicants' proposals were insufficiently weighted and that its preference should be upgraded. Specifically, CTC contends that CMC and Celcom will suffer intra-system interference and that CTC will maintain a higher grade of service than CMC or Celcom. The STS also supports the preference awarded to CTC. The STS contends, *inter alia*, that CTC should receive a preference because it allocated its channel capacity based upon its demand distribution.

28. We conclude that CTC has demonstrated a superior ability to accommodate demand and is entitled to a slight preference. Only CTC has demonstrated that it allocated system capacity to individual cells based on its projected demand distribution. CTC Proposed Findings, p.16; CTC Exhibit 32, Attachment 3, pp. 2-3; CTC exhibit 42R. *Cf. Chicago*, para. 30; *Pittsburgh*, para. 28. *We* affirm the judge's conclusion that Celcom's ability to accommodate first year demand cannot be ascertained because of its failure to provide a first year frequency plan. In addition, as we have already concluded, Celcom and CMC will have gaps in their 39 dBu coverage contours that may significantly impair coverage. See para. 13, *supra.* Because the judge reasonably concluded that these gaps result in a probability that coverage will be less reliable on highways in the affected areas, we affirm his findings and conclusions on this point. We are not persuaded that CMC is entitled to a preference for its proposed grade of service. Although CMC's target grade of service of .01 for its first three years of operation is slightly better than CTC's, we do not consider this to

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[22] Included as Figure 1 to CMC's Reply to Exceptions is a map of the New York MSA which purports to depict the percentage of voice channels available in each part of the MSA. This exhibit also contains transparent overlays showing Household Density, Private Employment Density and High Income Household Density. CTC filed a Motion to Strike this exhibit and related matter. This motion was supported in part by the STS. CTC argues that the exhibit is new evidence submitted by CMC in an impermissible attempt to upgrade its application after the filing date. CTC contends that the exhibit is not consistent with the record evidence on which it purportedly is based. Indeed, the legend submitted with the exhibit bears almost no relation to the evidence submitted in CMC's Direct Case. This defect, which CMC states was the result of an "inadvertent omission and/or transposition of some of the numbers therein," has been cured by an Erratum filed by CMC. We therefore conclude that CMC's exhibit is a presentation, in another form, of material already in the record and CTC's Motion to Strike will therefore be denied. CTC raises a further point concerning this exhibit. CTC argues that there is no evidence that any of the data depicted in CMC's exhibit were actually used to assign channels to individual cells. This argument goes to the weight to be accorded CMC's exhibit and it will therefore be discussed below.

be a significant difference because any of the grades of service proposed by the applicants would be acceptable to the consumer. See *Chicago Final Decision*, at n. 32.[23] Nor is CMC entitled to a preference for its depth of coverage system design. *See* note 14, *supra.* Similarly, although CMC's Reply Exceptions demonstrate that there are some concentrations of demand indicia in areas where it has allocated a high percentage of its channels, CMC has failed to demonstrate that its system would therefore be better able to accommodate demand than CTC's or Celcom's.[24] Furthermore, all of the applicants possess the requisite technical expertise to construct and operate a cellular system. CMC is therefore not entitled to a preference on this basis. We emphasize that the preference awarded to CTC is not based upon a finding that CMC would suffer intrasystem interference. We have repeatedly held that some degree of intrasystem interference is to be expected in any maturing cellular system but that such interference can be managed effectively because all of the potentially interfering transmitters are under the control of the same carrier. *See, e.g., Chicago Final Decision*, at para. 40. Nevertheless, the slight preference awarded to CTC on this sub-issue is fully supported by the record.

29. *Ability to Accommodate Demand for Roamer Service.* The presiding judge awarded CMC a moderate preference for its proposed service to roamers. The judge found CMC's proposal to use a single local roamer access number followed by the roamer's home system phone number superior to the other applicants' proposals. He also concluded that CMC's rates for roamer service appeared to be nondiscriminatory toward roamers. Both Celcom and CTC take exception to these conclusions as contrary to Commission precedent. CTC also argues that the judge's findings under this sub-issue are contrary to the evidence.

30. We agree with CTC and Celcom that our holding on this issue in *Chicago* controls here. The differences between the applicants adduced by the judge relate only to the treatment to be accorded to roamers rather than the applicants' ability to accommodate demand for roamer service. *See Chicago*, para. 31. Accordingly, there is no basis for awarding a preference to any of the applicants on this issue.

31. In summary, we have awarded CTC preferences for its superior coverage of area and population and for its more reliable analysis of the extent and distribution of demand in the New York MSA, and a slight

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[23] In this regard, we note that the judge correctly found that CTC had underchannelized four cells by one channel each. Nevertheless, the grade of service at each of these cells would be between .02 and .025. We therefore do not consider this defect serious.

[24] Indeed, CMC's exhibit shows that the area of the MSA to which it has allocated over 40% of the channels in its system has relatively sparse concentrations of demand indicia. In addition, some areas of the MSA to which it has allocated no more than 6% of its channels show significant concentrations of these demand indicia.

preference for its ability to accommodate local demand. No applicant was preferred for its ability to accommodate demand for roamer service.

III Issue (b)

32. This issue requires a comparison of each applicant's proposal to expand its system capacity to meet anticipated increasing demand for service. We have indicated that preference is to be given to designs entailing efficient frequency use including, but not limited to, the applicant's plans for cell-splitting and additional channels, capacity for frequency reuse, and the applicant's ability to coordinate the use of channels with adjacent or nearby cellular systems. *See Designation Order*, para 44, n. 30; *Cellular Communications Systems*, 86 FCC 2d at 503.

33. The judge concluded that CTC had proposed the best expansion plan of the three applicants. Specifically, the judge concluded that CTC had proposed a general plan that would allow it to expand its system in a coordinated manner. The judge concluded that this plan demonstrated an understanding of all known expansion methods and that CTC's 91-cell future system is an example of how it will expand. The judge found CTC superior to Celcom because Celcom's expansion plan is severely limited. Celcom's claim that its proposal gives it greater flexibility than the other applicants was diminished by the lack of detail in its expansion plan. In addition, the judge concluded that CMC's expansion plan stated all the essential elements of expansion. Nevertheless, the judge found that CMC was comparatively inferior to CTC because of interference and handoff problems. *I.D.*, paras. 80-82

34. Both CMC and Celcom take exception to the preference awarded to CTC, each arguing that its own proposal should be preferred. CMC and Celcom contend that the preference awarded to CTC is inconsistent with our treatment of this issue in our decisions in the Pittsburgh and Chicago proceedings. Celcom argues that CTC's expansion plan is merely illustrative and that our holding in our *Pittsburgh Final Decision* does not allow a preference for a "general" expansion plan. CMC also asserts that CTC's proposal lacks sufficient detail to warrant a preference and that what detail is given indicates that expansion of CTC's system will not be smooth.[25] Both CMC and Celcom claim that their expansion proposals contain sufficient detail to merit a preference. Both applicants also assert that their proposals are more flexible than CTC's and therefore deserve a preference under our *Chicago* holding. Celcom asserts that it has proposed a phased-in approach similar to that favored in *Chicago*. According to Celcom, this approach will allow it to expand its system

[25] Specifically, CMC asserts that CTC will space channels in sectorized cells only 120 KHz apart and that the minimum combining separation for CTC's equipment is 630 KHz.

based on experience. In contrast, Celcom claims, CTC and CMC will build their larger systems without knowing where demand will be. CMC also claims to be flexible, noting that it can reallocate channels as needed. In addition, CMC reiterates its contention that its depth of coverage system design would allow it to cover widely varying demand distributions. Both CMC and Celcom take exception to the conclusion that their systems contain defects that impair their ability to expand.[26] Celcom also asserts that it should be preferred for its greater commitment to maintaining its grade of service. CTC believes that its preference if fully justified. The STS concludes that both CTC's and Celcom's expansion plans are flexible while CMC's is not and that Celcom's proposal is insufficiently detailed. The STS believes that Celcom and CTC should both receive a slight preference.

35. We will affirm the judge's findings and conclusions under this issue, with certain modifications. CMC's argument that CTC's proposal lacks sufficient detail to merit a preference is contrary to the evidence of record. See *I.D.*, para. 46. In addition, although CTC's expansion plan may fairly be described as "general," it contains sufficient detail to enable us to assess CTC's ability to expand its system in a coordinated manner and to compare the applicants' expansion plans.[27] Celcom's expansion plan does not demonstrate the ability to expand its system in any way beyond the activation of the 706 channels it proposes to allocate to its 22-cell system. In addition, CTC's phased-in expansion plan retains a greater degree of flexibility than CMC's approach. As the STS has noted, flexibility, as discussed in *Chicago*, is a function of the nexus between an applicant's system design and its anticipated demand. CMC has designed its system based on its projected fifth-year demand. Although this is an acceptable approach to system design, it necessarily is less flexible than CTC's approach of devising a general expansion plan and expanding its system on the basis of actual operating experience. Flexibility is not a question of more cells versus fewer cells or closely-spaced cells versus widely-spaced cells as Celcom implies. We therefore reject Celcom's

[26] Celcom contends that the judge's conclusion that its expansion plan is deficient is in conflict with our conclusion in *Pittsburgh* that its proposal is adequate. CMC disputes the judge's interference and handoff conclusions.

[27] In *Pittsburgh*, the judge awarded a preference to MCI under this issue solely because of its proposal for evaluating and monitoring system traffic congestion. We found the judge's conclusion that MCI was superior on this basis to be unsupported by the record. There was therefore no basis in the record for preferring any of the applicants' expansion plans. Accordingly, we reversed the *I.D.* on this point and concluded that none of the Pittsburgh applicant could be preferred under this issue. *Pittsburgh, supra*, paras. 44-45.

argument that it should be preferred for its greater degree of flexibility.[28] Nor is Celcom entitled to a preference for its greater commitment to maintaining its proposed grade of service.[29] All three applicants have proposed reasonable criteria for determining when increasing demand requires system expansion. Therefore, none of the applicants is preferable on this basis. Finally, we emphasize once again that our conclusion here is not based on the potential intra-system interference in CMC's or any other applicant's system. As we stated in *Pittsburgh, supra*, para. 43, "[w]e will not consider intrasystem interference to be decisionally significant, whether co-channel or adjacent channel, because the system operator has the ability to adjust the operating parameters of its system." *See also Seattle, supra*, para. 43.

36. In summary, we have concluded that CTC's expansion plan is superior to Celcom's and CMC's because it demonstrates a better understanding of the principles of cellular system expansion. Accordingly, CTC is entitled to a slight preference under Issue (b).

IV. Issue (c)

37. Issue (c) requires comparison of the nature and extent of services proposed by each applicant, including rates and charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching facilities). In *Cellular Communications Systems* we indicated that this issue is not as significant as Issues (a) and (b). 86 FCC 2d at 503. We also stated that, while the adequacy of base station and switching facilities might be an issue in some cases, we did not expect it to be a significant issue in general. Finally, we noted that personnel and practices would be significant "to the extent that they affect an applicant's ability to implement its proposal." *Id'*

38. *Rates and Charges.* The judge awarded CMC a preference for its proposed rate structure, concluding that its proposal will result in more efficient and economical system usage than the other applicants' proposals. CMC has proposed a three-tiered rate structure. CMC has also proposed a shorter billing increment than either of the other applicants.

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[28] As we have already indicated, Celcom's expansion plan does not contain sufficient detail to merit a preference here. We reached a similar conclusion in our *Pittsburgh Final Decision*, para. 45. Therefore, the judge's conclusion that Celcom's lack of detail renders it deficient is not in conflict with our holding there. Celcom attempts to portray this lack of detail as "flexibility," asserting that "it is the antithesis of flexibility to show 'specific steps' for future expansion." Celcom Exceptions, pp. 34-35. As our discussion here indicates, Celcom has misconstrued what we mean by flexibility. Indeed, were we to take Celcom's argument to its logical conclusion, we would reach the absurd result that an applicant proposing a one-cell system and no expansion plan would receive an automatic preference for proposing the most "flexible" plan.

[29] The grade of service Celcom proposes to maintain, .05, is inferior to the grade of service proposals of CTC and CMC.

Celcom would bundle 100 message units into its monthly access charge and CTC has bundled several customized services into its monthly fee, while CMC has proposed an unbundled rate structure. For these reasons, the judge concluded that "CMC comes closes to the goal of billing only for actual air time used" and accordingly awarded CMC a preference. *I.D.*, paras. 85, 87.

39. Celcom argues that CMC should not get a preference for its rate structure; Celcom considers CMC's heavy reliance on charges for air time used to be unsound. CTC also contends that CMC should not be preferred. CTC argues that CMC also bundles some service features and that there is no evidence to support a particular bundling proposal or number of rate-tiers. We agree with the judge, however, that CMC's rate structure is to be preferred. We believe that CMC's rate structure will best serve to promote the Commission's policy favoring usage-sensitive, cost-based pricing. Consistent with our treatment of this issue in our prior cellular decisions, however, CMC will not be preferred for its proposed rate levels. *See Chicago, supra*, paras. 48 and 49.

40. *Maintenance, Personnel and Facilities.* The judge concluded that none of the applicants deserved a preference for its proposal concerning personnel, maintenance and facilities. None of the applicants' personnel proposals was found likely to so clearly enhance the applicants' ability to implement its proposal that a preference was merited. Nor did the judge believe there was any persuasive evidence on which to find that any applicant's proposed maintenance plan or facilities were significantly superior to the others. Therefore, no preferences were awarded in these areas either. CTC and CMC both argue that they should be preferred. CMC asserts that its personnel proposal is more comprehensive than the other applicants' and will measurably affect its ability to implement its overall proposal. CTC argues that it should receive a preference for its superior ability to implement its overall proposal. CTC argues that it should receive a preference for its superior ability to implement its proposal due to existing local personnel and facilities. In this regard, CTC relies heavily on the resources of the local radio common carriers that own 20% of its stock. On the other hand, CMC argues that its proposal to put a consumer representative on its board of directors deserves a preference for "consumer sensitivity."[30] Celcom opposes the grant of a preference to

[30] CMC also contends, in a footnote to is exceptions, that its application should be preferred for its proposal "to fund minority and female controlled agencies to engage in the marketing of cellular services." CMC Exceptions at 44, n. 51. As CMC is aware, the Commission has repeatedly rejected its argument that this proposal merits a comparative preference. *See, e.g., Pittsburgh, supra*, para. 53. CMC argues, however, that we should reconsider that conclusion because congressional policy favors enhancing minority participation in the ownership of emerging communications technologies. This argument is irrelevant, however, in view of the fact that CMC's proposal does not involve

either CMC or CTC for any of these reasons. Celcom argues that, because CMC's affiliate did not get a preference in the Pittsburgh or Chicago proceedings, it cannot receive a preference here. Celcom also argues that, because each of CTC's minority shareholders owns such a small portion of the applicant, a preference cannot be based upon their participation. CMC concurs in this argument.

41. We agree with the judge's conclusion that none of the applicants is to be preferred in these areas. As we stated in *Cellular Communications Systems, supra*, personnel and practices will be significant to the extent they affect an applicant's ability to implement its proposal. 86 FCC 2d at 503. We also stated we did not expect maintenance proposals to present a significant issue in general. *Id.* On review of the record we find all three applicants set forth adequate personnel and maintenance proposals. Moreover, we cannot find that any of the proposals will measurably affect any applicant's ability to implement its system. Finally, we do not believe that CMC's proposal to reserve a seat on its board of directors merits a preference. Sensitivity to consumer needs, while laudable, is not encompassed by the designated issues. Accordingly, the judge's decision will be affirmed and no preference will be granted under these issues. *See Chicago Final Decision, supra*, at para. 51.[31]

V. Procedural Matters

42. Both Celcom and CMC have raised a number of issues concerning the conduct of the hearing in their exceptions. Celcom argues that the judge erroneously excluded certain exhibits that it sought to introduce into evidence. These include testimony comparing Celcom's system design with that proposed by AMPS (now the New York SMSA Limited Partnership), the wireline cellular licensee in New York. In addition, Celcom sought to introduce testimony filed by Lin with its Petition to Deny the CSI (now CTC) application. We affirm the judge's exclusion of Celcom's evidence on both of these points. Although we have recognized the technical expertise of AT&T (and, by extension, of its divested subsidiaries), *see, e.g., Cellular Communications Systems*, 86 FCC 2d

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minority participation in ownership. Accordingly, we decline CMC's invitation to review this matter anew.

[31] Celcom also alleges in its exceptions that CTC's application poses a threat to competition and asserts that its application poses no such danger. Celcom notes that CTC's shareholders compete in offering paging service in New York and asserts that allowing them jointly to operate a cellular carrier will lead to concentration of control and anticompetitive behavior in the paging market. Celcom therefore believes that its application should be preferred. While we are mindful of our responsibilities to consider seriously the potential anticompetitive effects of an applicant's proposal, this is but one factor in our public interest analysis. *See United States v. FCC*, 652 F. 2d 72, 88 (D.C. Cir. 1980). In this instance Celcom's argument is completely speculative and, as such, does not warrant further analysis.

469, 488-89 (1981), the AMPS system design can in no way be considered a "benchmark" in evaluating the merits of nonwireline applications. The purpose of this proceeding was to compare the designated applications with one another, not with AMPS' proposal. Thus, Celcom's evidence was properly excluded as irrelevant. Similarly, Lin's proferred testimony was filed in an adversarial pleading before Lin and CSI merged. Lin's Petition to Deny CSI's application was denied. Subsequently, Lin and CSI merged. Lin is no longer a party to this proceeding and therefor the judge properly excluded its proferred testimony as irrelevant. Moreover, essentially similar arguments have been raised by CMC and Celcom and rejected. *See*, paras. 20-21, *supra*; *I.D.*, para. 72. The proferred evidence is therefore merely cumulative.

43. Celcom asserts that the hearing was conducted in such a manner as to deprive the applicants of an equitable and meaningful hearing, as required by *Ashbacker Radio Corp v. FCC*, 326 U.S. 327 (1945), the Administrative Procedure Act and Sections 309 and 409 of the Communications Act, in that the judge did not allow discovery or cross-examination. Celcom argues that this tended to frustrate the development of a record that would permit selection of the best application. Celcom argues that discovery of the back-up materials involving expert witness testimony concerning demand studies and technical materials was needed in order to determine the accuracy and relevance of the studies and that the judge erred in denying Celcom's request to cross-examine Dr. Morris Gottlieb, CTC's survey consultant.

44. We find that the procedures used in this proceeding were fully consistent with our expedited hearing procedures, 89 FCC 2d at 90-94, the Administrative Procedure Act, Section 309 of the Communications Act and the requirements of due process. When we adopted those procedures, we explicitly left it to the judges to decide whether cross-examination was required to assure an adequate record. We conclude that the judge's decisions denying cross-examination and discovery were not an abuse of his discretion, and that an adequate record was developed in this case.[32]

45. Finally, we have received petitions for leave to amend from CMC and CTC. CMC's amendment is an updated listing of Commission licenses held by Graphic Scanning (CMC's parent) or its affiliates. By its amendment, CTC proposes to lower the antenna tower of its cell 42 by sixteen feet. This modification has been proposed to remove a hazard to

[32] Celcom also argues that the applications of CTC and CMC should be dismissed for violating section 22.903(a) of the rules. CTC and CMC originally proposed extensions of their 39 dBu coverage contours beyond the boundaries of the MSA. These extensions were found not to be *de minimis*. However, in the Designation Order we allowed the applicants to file conforming amendments to bring their applications into compliance with the rules. Therefore, Celcom's request that we dismiss the applications amounts to an untimely petition for reconsideration and is therefore rejected.

aviation and will reduce the cell's 39 dBu coverage contour by 0.38 square miles. Neither of these amendments has been opposed by any party, nor would either amendment improve the comparative posture of either applicant. Accordingly, we will accept the proffered amendments.

VI. Conclusions

46. Based on the record before us, we have concluded that CTC is entitled to preferences under Issue (a) for its superior coverage of area and population, and its more reliable assessment of the extent and distribution of demand for service in the New York MSA, and a slight preference for its superior ability to accommodate local demand. CTC is also entitled to a slight preference under Issue (b) for its more flexible expansion plan while CMC is entitled to a slight preference under Issue (c) for its proposed rate structure. We therefore conclude that the public interest, convenience and necessity would be best served by the grant of CTC's application.

47. Accordingly, IT IS ORDERED, That the application of Cellular Telephone Company (File No. 26126-CL-(P)-(49)-82 IS GRANTED and the applications of Celcom Communications Corporation (File No. 26159-CL-P-(22)-82) and Cellular Mobile Corp. (File No. 26165-CL-P-(66)-82) ARE DENIED.

48. IT IS FURTHER ORDERED, That the Motion to Strike filed by Cellular Telephone Company IS DENIED.

49. IT IS FURTHER ORDERED, That the Motions for Leave to Amend filed by Cellular Mobile Corp. and Cellular Telephone Company ARE GRANTED.

50. IT IS FURTHER ORDERED, That the grant to Cellular Telephone Company IS CONDITIONED upon its obtaining the appropriate antenna structure clearances.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

FCC 84D-15

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	CC Docket No. 83-101
Celcom Communications Corporation	File No. 26159-CL-P-(22)-82
Cellular Telephone Company	File No. 26126-CL-P-(49)-82
Cellular Mobile Corp.	File No. 26165-CL-P-(66)-82
For a construction permit to establish a new cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the New York, New York, modified Standard Metropolitan Statistical Area	

Appearances

S. William Livingston, Jr. on behalf of Celcom Communications Corporation; *Ben C. Fisher* on behalf of Cellular Telephone Company; *William K. Keane* on behalf of Cellular Mobile Corp.; and *Giovanna M. Longo* on behalf of the Separated Trial Staff, Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FREDERIC J. COUFAL

Issued February 28, 1984; Released March 2, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Celcom Communications Corporation (Celcom), Cellular Telephone Company (CTC), and Cellular Mobile Corp. (CMC) for authority to construct and operate a new cellular radio system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the New York, New York modified Standard Metropolitan Statistical Area (SMSA).

2. By *Memorandum Opinion and Order Granting Applications and Designating Applications for Hearing*, (CC 2418), released February 18, 1983,[1] the Chief, Common Carrier Bureau, acting pursuant to delegated authority, designated the applications for hearing on the following issues:

(a) to determine whether LIN Cellular Communications Corporation is financially qualified to construct and operate for one year its proposed cellular system;

(b) to determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;

(c) to determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed CGSA[2] in order to meet anticipated increasing demand for local and roamer service;

(d) to determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and

(e) to determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.

3. Pursuant to the expedited hearing procedures governing evaluation of cellular radio applications in the top thirty modified SMSAs, 47 C.F.R. 22.916(b)(1), the applicants filed their direct cases with their applications on June 7, 1982. Issue (a) was resolved favorably to LIN by *Memorandum Opinion and Order*, FCC 83M-1398, released April 29, 1983, leaving no qualifying issues remaining. On March 18, 1983, LIN and Cellular Systems, Inc. merged to form Cellular Telephone Company. The merger was approved by *Memorandum Opinion and Order*, FCC 83M-2261, released July 13, 1983. Rebuttal testimony was filed by the parties on May 18, 1983. A hearing session was held on September 13 and 14, 1983 at which time rulings were made on objections, offers of exhibits, and requests for cross-examination. The record was closed by *Order* (FCC 83M-3931), released November 1, 1983. Proposed Findings of Fact and Conclusions of Law were filed on December 1, 1983. Reply findings were filed on December 30, 1983.

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[1] *Advanced Mobile Phone Service, Inc.* (*Designation Order*), 48 Fed. Reg. 8577, published March 1, 1983.

[2] Cellular Geographic Service Area.

Findings of Fact

The Applicants

4. Celcom, a New York corporation, is a wholly-owned subsidiary of Associated Communications Corporation (Associated). Associated is a publicly held Delaware corporation which, directly and through subsidiaries, operates a radio common carrier in the New York City area and broadcast stations in other markets. (Celcom Appl. Ex. 1, p. 1; Celcom Ex. 9, App. A, p. 3.)[3]

5. CTC is a joint venture of Cellular Systems, Inc. (CSI) (50%), LIN Cellular Communications Corporation (45%), and Metromedia, Inc. (5%). (CTC Ex. 43, Att. 1, p. 6.)[4] Metromedia also has a 60% ownership interest in CSI. (CTC Ex. 1, p. 1.) CSI, LIN and Metromedia operate radio common carriers in the New York area. (CTC Ex. 43, Att. 3, pp. 7-18; CTC Ex. 44, pp. 1-3.)

6. CMC is a wholly-owned subsidiary of Cellular Mobile Systems, Inc., which in turn is wholly-owned by Graphic Scanning Corporation. Graphic Scanning, directly and through subsidiaries, provides specialized data and message processing and communications services. (CMC Ex. 1, pp. 1-7.)

Issue (b)

7. The New York, New York modified SMSA consists of 17 counties; 10 in New York: Bronx, Kings, Nassau, New York, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester; and 7 in New Jersey: Bergen, Essex, Hudson, Morris, Passaic, Somerset, and Union, with a total dry land area of 3,818 square miles and a total 1980 population of 14,696,685.[5]

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[3] References to the record in this proceeding are as follows:

Direct case testimony is identified by sponsor and exhibit number. For example, Celcom Ex. 1, p. 1. Reference may also include volume number, such as: CMC Vol. II, Sec. II. Rebuttal testimony is identified as, for example, Celcom R. Ex. 1, p. 1.

By *Order*, FCC 83M-739, released March 7, 1983, the parties were directed to file a report supplying information concerning the areas and populations of their proposed CGSAs. These reports are identified as, for example, Celcom Report.

By *Order*, FCC 83M-2489, released July 28, 1983, the parties were ordered to file supplements to their then-proffered direct cases describing their proposals with respect to first year and expansion plans. References to these supplements are identified as, for example, Celcom S., p. 1.

[4] A merger between CSI and LIN was approved by *Memorandum Opinion and Order, supra*, para. 3.

[5] *See*, U.S. Department of Commerce, Bureau of the Census, *State and Metropolitan Area Data Book 1982*, pp. 134, 178, 200.

8. Using a 100 foot minimum elevation to determine the 39 dBu contours,[6] Celcom proposes to cover 71.2% of the geographic area of the modified New York SMSA, CTC proposes to cover 91.4%, and CMC will cover 74.6%. [Celcom Report, Ex. 14, p. 1 (as amended July 5, 1983); CTC Report, Ex. 46, p. 1; CMC Report, p. 1.] The composite 39 dBu contours of Celcom's cellular system cover 2,719 square miles and approximately 13,853,291 people, or 94.3% of the modified New York SMSA population (Celcom Report, Ex. 14, p. 1, as amended July 5, 1983); CTC's system will cover 3,491 square miles and approximately 14,557,028 or 99.0% of the modified New York SMSA. (CTC Report, Ex. 46, p. 1.) The 39 dBu contours of CMC's cellular system will cover 2,847.5 square miles and encompass 14,275,177 people, or 97.1% of the modified SMSA population. (CMC Report, p. 1.)

9. None of the applicants proposes to serve the entire New York modified SMSA. CTC's proposal encompasses the greatest area and population within the SMSA, and its 39 dBu contours include five pockets not covered by either Celcom or CMC. The first is a 390.6 square mile section including most of Putnam County and most of the northeastern section of Westchester County. It includes Yorktown Heights, Pleasantville, and a narrow strip along the eastern border to Purchase. (CMC R. Ex. II, p. 5.) The area has an estimated population of 126,715, and is mostly residential, high income, and has low employment density. (*Id.*, at p. 6.) Included in the pocket are portions of several highways, I-84, I-684, the Taconic State Parkway, SR 172, U.S. 6, SR 117, and SR 52. (*Id.*, at p. 7.) The second pocket is a 10.5 square mile area in Westchester County from Purchase to Rye on Long Island Sound, with an estimated population of 6,369. (*Id.*, at p. 8.) This area is characterized by high income households with some commercial and industrial activity. The pocket is served by two east-west routes, U.S. 1 and the Hutchinson River Parkway, and the I-95/I-287 interchange. (*Id.*, at pp. 8-9.) The third pocket is a 48 square mile area of Suffolk County covering portions of both arms of the eastern end of Long Island and portions of Shelter Island and Gardiners' Island. The total population is 8,619, and is used primarily for residential and recreational purposes. Two highways cross the area: SR 25 to the north arm and SR 27, (Montauk Highway) to the south arm. (*Id.*, at pp. 10-11.) The fourth CTC pocket is a 23.5 square mile area of Suffolk County, extending northward in an arc from Mastic Beach to the eastern portions of Brookhaven and South Manor. It follows a curved line south to a point just west of Eastport and includes portions of the towns of Moriches, East Moriches, and Manorville. It also includes portions of Fire Island. (*Id.*, at p. 11.) The estimated population is 18,261 and is mostly

[6] *See*, 47 C.F.R. 22.504(b) where a 100 foot minimum elevation value is the standard used by the Commission. Propagation charts are not given for elevations below 100 feet.

residential and recreational in use. It is served by two east-west routes, SR 27 (Sunrise Highway) and SR 27A (Montauk Highway). (*Id.*, at pp. 11-12.) The fifth CTC pocket is a 321.8 square mile area of New Jersey including portions of Somerset and Morris Counties, New Jersey; it includes the towns of Rockaway, Wharton, Chester, Dover, and Mendham. (*Id.*, at p. 13.) The area has a high income residential area and significant commercial activity. Significant traffic volumes occur on highways I-78, I-287, I-80, and moderate traffic volumes occur on U.S. 22, U.S. 46, and U.S. 206. (*Id.*, at pp. 13-16.)

10. CMC's proposal encompasses two pockets not covered by either Celcom or CTC. The first pocket is an area of 59.8 square miles located on the north shore of Long Island in Suffolk County extending from Belle Terre and Port Jefferson on the west to Wildwood State Park on the east. The area is mostly residential, has an estimated population of 28,876, and has three state highways, SR 25A, SR 112, and SR 347, traversing it. (CMC R. Ex. II, pp. 3-4.) The second pocket is a 1.2 square mile area of Robert Moses State Park on Fire Island. (*Id.*, at p. 5.)

11. Celcom has no unique pockets of service. It has proposed the smallest service area of the three applicants. In addition to the seven areas described above which Celcom does not serve, it also fails to cover the following areas: to the west of cells 21 and 22, the area of Westchester County which includes Tarrytown and Peekskill and the area of northern New Jersey which includes the Palisades Interstate Parkway (CTC R. Ex. 49, pp. 2-3); on the southern end of Long Island, the area which includes Jones Beach State Park, portions of the Meadowbrook State Parkway, the Wantaugh State Parkway, and the Robert Moses Causeway; on the northern end of Long Island, the towns of Glen Cover, Bayville, Oyster Bay, and portions of Lloyd Harbor (*Id.*, at p. 4); in New Jersey, the towns of Anneville, Belle Beach, Blacksville Mills, Blawenburg, Centerville, Clyde, Flagtown, Frankfort, Greggstown, Harlingen, Kendall Park, Middlebush, and Neshansic, and portions of highways I-80 and Routes 46, 23, and 280, and in a strip of land south of Suffern, New York, to Midland Park and west to Hewitt, New Jersey, a portion of I-87/287 and Routes 17, 59, and 202. (*Id.*, at pp. 6-8.)

12. In addition to the above referenced pockets of coverage, Celcom and CMC have cells which are entirely isolated from the rest of their systems and which create internal gaps in coverage. (CMC conforming amendments, filed April 16, 1983; Celcom amendment of July 5, 1983, Map.) Specifically, Celcom cells 21 and 22 in Westchester and Putnam Counties are not connected by 39 dBu contour overlap to the rest of the Celcom system to the south. Service and handoff will be unreliable between these cells and cells 18 and 20. (Celcom amendment of July 5,

1983, Map.) There is also an internal gap in Celcom's coverage in the area of Fairfield, New Jersey between cells 9, 10, 15, and 16. (*Id.*)

13. CMC's proposed cell 064006 is not connected by 39 dBu contour overlap with the rest of the system. Service and handoff will be unreliable between that cell and CMC cells 064004 and 064005 in New Jersey. (CMC conforming amendment, filed April 16, 1983.) Examination of the 39 dBu contours of the applicants indicates that each will experience hand-off problems because major highways traverse gaps between the 39 dBu contours of certain of their cells. These internal gaps are as follows:

CTC

Cells	*Highway*	*Mileage*	*Location*
42 and 44 (Amityville & Oakdale)	Causeway	1.0	Long Island

(CTC Ex. 42, Figure 2.)

CMC

Cells	*Highway*	*Mileage*	*Location*
61017 and 61014	S.R. 27	4.5	Long Island
64006 and 64005	U.S. I-287	1.0	SW SMSA
	U.S. I-22	5.0	SW SMSA
64006 and 64004	U.S. I-78	1.5	SW SMSA

(CMC conforming amendments, filed April 16, 1983; CTC R. Ex. 48, Atts. B, C, and D.)

Celcom

Cells	*Highway*	*Mileage*	*Location*
9 and 15	U.S. I-280	2.5	Northwest SMSA
	U.S. 46	5.0	
	U.S. I-80	5.5	
15 and 16	Route 23	1.5	Northwest SMSA
18 and 21	Route 128	4.0	Northeast SMSA
	Taconic State Pkwy	4.0	
	Saw Mill River Pkwy	3.5	
	U.S. I-684	5.5	
4 and 5	Route 25	2.0	Long Island
4 and 3	S.R. 27	3.0	Long Island
	Route 107	2.0	
2 and 3	S.R. 27	0.25	Long Island
1 and 2	Route 25	1.0	Long Island
9 and 10	Route 24	0.5	Northeast SMSA

(Celcom amendment of July 5, 1983, Map; CTC R. Ex. 48, Atts. L, M, and P.)

14. CMC urges that a comparison be made among the applicants on the basis of their respective "depths" of coverage; i.e., the number and

reach of overlapping cells in each proposed system. (CMC R. Ex. 1, pp. 1-2, 4-7.) CMC argues that depth of coverage has particular benefits to service to New York's four tunnels — Holland, Queens Midtown, Lincoln, and Brooklyn Battery. (CMC R. Ex. 1, pp. 1-2, 12-13.)

15. The areas of cell overlap in square miles for each applicant are as follows:

Coverage Overlapped By	*Celcom (sq. mi.)*	*CTC (sq. mi.)*	*CMC (sq. mi.)*
1 other cell	335.6	805	779.6
2 other cells or more	89.4	2,675	2,068.4
3 other cells or more	2.5	1,650.7	1,595.2
4 other cells or more	0	1,083.2	1,232.7
5 other cells or more	0	675.7	1,004.9
6 other cells or more	0	430.7	803.6

(CMC R. Ex. 1, p. 7, Table II-1.)

Relative Demand for Service

16. Each of the applicants conducted studies to determine relative demand for cellular radio service. Based on their research, the applicants forecast demand as follows:

Year	*Celcom*[7]	*CTC*	*CMC*
Initial		6,000	9,961
2		9,500	23,169
3			39,706
4	22,500		52,946
5			66,133

(Celcom Ex. 5, p. 2; CTC Ex. 37, p. 14; CMC Ex. II, pp. 14, 16-18.)

17. Celcom conducted two studies to "determine and confirm the demand for cellular service within the market, and the need for channelization of the market's various cells." (Celcom Ex. 2, p. 1.) Neither study was intended to be a scientific survey. (Celcom Ex. 14-A, p. 3.) The first study was a user study based on telephone interviews of New York City businesses conducted during May 1982 by employees of Associated Communications of America, Inc., Celcom's parent. (*Id.*, at p. 2.) In order to determine which type of businesses to contact, Celcom relied on the Lehman Brothers Kuhn Loeb (LBKL) industry review of the cellular radio market. (*Id.*, at p. 2.) Three hundred forty-one New York City businesses were interviewed, based on the industry categories identified by the LBKL industry review and picked on a random basis from New York City's telephone directory. (*Id.*, at p. 2.) No businesses outside of New York City were surveyed. Of the 341 respondents, 38 were construction

[7] The Celcom demand figure is dated from the grant of the applicant's construction permit. (Celcom Ex. 5, p. 2.)

companies, 15 were manufacturing companies, 25 were sales-related businesses, 6 were real estate companies, 10 were wholesale distributing companies, 2 were medical establishments, 7 were marina businesses, 110 offered "services," and 84 companies were classified as "other." (*Id.*, at p. 4.)[8]

18. Respondents were questioned concerning their preferences for mobile and portable telephones, whether the respondent would subscribe to cellular service at a specified monthly rate, and preferences concerning lease or purchase of equipment. (*Id.*, at p. 5.) Although Celcom asserts that the survey was used to determine demand for cellular radio service in New York, it further states that it did not use a market demand survey of the New York market, but instead used a common sense approach in arriving at subscriber estimates. (Celcom R. Ex. 18, p. 6.)

19. Celcom's second study was a demographic analysis based upon a review of Urban Decisions Market Memos, compiled by Urban Decisions System, Inc. 1982, which provided information on population density, income distribution, and population change within the market. (Celcom Ex. 2, p. 1.) In developing estimates of the number of users both system-wide and cell by cell, Celcom relied on its experience in marketing mobile telecommunications services, and on data of projected mobile telephone use from Telocator, Motorola, LBKL, and International Resource Development Inc. as well as on need studies and the personal experience of Paul L. Coppage, Celcom's Director of Corporate Development. (Celcom Ex. 3, p. 2.)

20. CTC's subscriber projections were based on three surveys of business and household populations in the SMSA conducted by Business Research Associates, Inc. between April 22, 1982 and May 11, 1982. (CTC Ex. 37, pp. 1-2, 6.) The first survey, the General Business Survey, included interviews with 405 respondents representing business and professional establishments in the SMSA. (*Id.*, p. 3.) The second survey, the Special Business Sample included interviews with 408 respondents representing business and professional establishments judged by CTC to have a more than average interest in the use of mobile communications. The sampling frame consisted of businesses in selected classifications listed in the classified telephone directory. The sample was augmented by a sample of 50 firms listed in the Dun and Bradstreet Million Dollar Directory. (*Id.*, at pp. 3-4.) The Special Business Sample was not used to project overall demand, but rather to develop findings concerning preferences for various types and conditions of service among the most likely subscribers. (*Id.*, at p. 4.) The third survey, the Household Sample, included interviews with 400 heads of households with an annual household income of $35,000

[8] The "service" and "other" categories comprise 70% of the Celcom sample, although neither category is included in the LBKL analysis.

or more. The sample was drawn by National Family Opinion, Inc., a national marketing research firm, which maintains a file of households which have agreed to participate in mail or telephone surveys. (*Id.*, at p. 4.)

21. The questions asked in the General Business Survey included the likelihood of use of any type of mobile communications services; likelihood of subscribing at a leasing cost of $40 to $90 a month, and a service cost of $50 a month; the number of mobile phones required; and, the likelihood of use at total monthly costs of $75 or $100. (CTC Ex. 37, Att. D.) Respondents were asked to quantify their likelihood of subscribing by selecting one of five responses: would definitely, would probably, would possibly, would probably not, would definitely not. Those who said they would definitely or probably subscribe were termed "acceptors" by CTC. (CTC Ex. 37, p. 8.) At the middle price range ($75 service costs, $40 to $90 a month leasing), 8 of 405 (2%) were classified as acceptors. (CTC Ex. 37, Att. F, Table 13.) CTC applied the 2% figure to the total number of New York businesses (500,000), and concluded that there was business demand for 10,000 subscribers. (CTC Ex. 37, p. 12.) CTC also determined that the expected number of phones that would be used per cellular radio acceptor was 2.2 for the middle price, and that its share of the New York market would be 36%. (*Id.*, at pp. 10, 14.) CTC concluded there would be a demand of 7,920 subscriber units from business customers (500,000 x .02 x 2.2 x .36 = 7,920). (*Id.*, at pp. 12-13.)

22. The questions asked in the Household Sample included whether, based upon a leasing cost of $40 to $90 a month and a service cost of $50 a month, the respondent would become a personal subscriber, whether the respondent would subscribe if the service costs were $75 or $100 a month, and how many would subscribe in the first year. (CTC Ex. 37, Att. D.) The survey showed that two respondents out of 400, or 0.5% were acceptors and would use it predominantly for personal use. (*Id.*, at p. 13.) Each household was presumed to intend to use one unit. CTC applied its results to the total number of New York households with incomes over $35,000, and adjusted by the 36% market share. CTC concluded there would be a demand of 1,620 subscriber units for personal use (.005 x 900,000 x .36 = 1,620). (*Id.*, at p. 13.) CTC estimated, therefore, a total initial demand of 9,500 units. CTC also estimated that a demand of 6,000 units would be realized in the first year, and the full demand of 9,000 units would be attained in the second year. (*Id.*, at p. 14.)

23. CTC performed a demand distribution study based primarily on traffic flow data provided by the Tri-State Regional Planning Commission. (*Id.*, at p. 15.) CTC divided vehicle miles by average speed to provide an estimate of the number of vehicles in use in each square mile of 95% of the modified New York SMSA. The percentage of the total vehicles in each

cell determined the percentage of forecasted demand allocated to that cell. (CTC Ex. 37, pp. 14-18.)

24. CMC commissioned six market research studies to forecast demand for cellular radio service in the SMSA. (CMC Ex. II, pp. 2-19; CMC Vol. II, Introduction.) In general, CMC's research is based on the assumptions that businesses will be the primary users of cellular service and that the current use of radio paging devices reflects a pattern which will be applicable to the use of cellular radios. (CMC Ex. II, pp. 5, 12-14.)

25. CMC's first study, the Claritas Corporation survey, was designed to estimate demand for cellular service by analysis of pager penetration rates in various markets in which CMC's parent, Graphic Scanning Corporation, offers paging services. A sample of 5,541 radio common carrier accounts in four or six unnamed markets were selected and assigned an appropriate Standard Industrial Classification (SIC) code and the penetration for each code was calculated. (CMC, Vol. II, Sec. I, p. 4.) The study projected a market for 56,265 pager accounts and 122,434 pagers in the SMSA. (CMC Vol. II, Sec. I, Table.) The study also demonstrated that among pager users there is more of a propensity to purchase communications services on the basis of industrial classification than on location. Market-to-market differences are generally explained by the distribution mix of industrial classification within individual markets. (CMC Ex. II, P. 14; CMC Vol. II, Sec. I, pp. 3-6.) The Claritas study fails to demonstrate the connection between demand for paging service and the potential demand for cellular radio service. (CTC R. Ex. 59, p. 2.)

26. Graphic Scanning performed two telephone surveys, one of the general population of businesses in the SMSA, and the other of pager customers in the SMSA. (CMC Vol. II, Sec. II, p. 1; CMC Vol. II, Sec. III, p. 1.) One hundred ninety-two businesses were randomly selected for the business survey and seventy-five of the attempted interviews were completed. (CMC Vol. II, Sec. II, p. 1.) One hundred twenty-one pager customers were selected for the pager survey and sixty-one of the attempted interviews were completed. The companies were drawn sequentially, but on a random basis from a complete list of Graphic Scanning pager customers. (CMC Vol. II, Sec. III, p. 1.) The results of these telephone surveys appear in two sets of tables: the first table assumes that the answers of the nonresponding businesses would have mirrored the answers of those who did participate, the second assumes that each business which did not respond would have had no interest in cellular radio service. (CMC Vol. II, Sec. II, p. 1; CMC Vol. II, Sec. III, p. 1.)

27. Graphic Scanning also conducted two mail surveys. In the first survey, the names and addresses of businesses in New York were drawn from 15 SIC codes with high pager penetration; 3,048 questionnaires were mailed; 266 of the businesses responded. (CMC Vol. II, Sec. IV, pp. 1-2.)

The second survey analyzed 94 responses from a mail survey of 729 pager customers in New York. (CMC Vol. II, Sec. V, p. 2.) Approximately 7.3% of the businesses surveyed and about 11.5% of the pager customers surveyed would consider subscribing to cellular radio service. (CMC Vol. II, Sec. IV, p. 3; CMC Vol. II, Sec. V, p. 2.)

28. Westat, Inc. conducted a telephone survey in the top 30 markets in which Graphic Scanning and its cellular radio affiliates are applicants. Data from a total of 2,171 interviews were combined with 67 New York interviews, and a composite estimate of New York demand was derived by assigning a weight of 0.3 to the New York interviews and a weight of 0.7 to the interviews of the other 29 markets. (CMC Vol. III, Chap. 3, pp. 3-1 to 3-5.) The Westat study estimates a demand for 174,311 mobile units and 132,562 portable units in the first five years of cellular radio service based on very likely or probable users at a monthly cost of $110. (CMC Vol. III, Chap. 3, Table 3-7A.) Westat states that the results of its survey "must be interpreted as indications of interest rather than as predictions of use." (*Id.*, at p. 3-2.)

29. According to CMC, based on the six studies conducted, Graphic Scanning was able to categorize the major SMSAs according to their relative need for personal communication services, and to measure the projection of absolute need required within each CGSA. (CMC Ex. II, p. 15.) Figure II-7 displays the distribution of cellular radio service needs on a per one thousand population basis by SMSA. (*Id.*, at p. 16.) New York falls within the first of three intervals, and has a projected need of .0045 cellular units per one thousand population. (*Id.*) Based on the 1980 census population count, CMC projects a total market need for New York cellular radios to be 66,132 units. (*Id.*) Although CMC also states that Graphic Scanning relied on a variety of demographic data and research in allocating its frequencies, CMC's channels and users per cell have been allocated on a virtually uniform basis. (CMC Ex. 2, p. 5.) Specifically, cell sites 1 through 17 were each allocated 272 users in New York, while cell sites 22 through 36 were assigned 55 users each. (CMC Vol. II, Ex. IV, pp. 16-18; CTC R. Ex. 59, p. 5.)

Ability to Accommodate Local and Roamer Service

30. Celcom proposes to construct a five cell system (sites 10, 11, 12, 14, and 15) in its first year of operation. (Celcom Ex. 5, p. 3; Celcom Ex. 13A, p. 2.) Celcom proposes to use Anaconda-Ericsson equipment, one AXE-10 switch, omnidirectional transmit at all but one cell, and omnidirectional receive at all cell sites.[9] (Celcom Ex. 7, p. 2; Celcom Ex. 4, p. 5.) Celcom's

[9] Omnidirectional cells generally employ a single transmission antenna and have all channels available to all subscribers in the service area. Cells which are sectorized employ multiple directional antennas each serving a particular portion of the cell. Channels

initial five cells would provide service around Manhattan and additional cells would be added to provide service outward from the central five cells. Celcom's first five cells would be operational within one year after grant, with the system expanded to 22 cells two years after grant of a construction permit. The order in which the cells will be constructed will be based on two factors: (1) further demand indications generated by the switch information as to high usage in cells during the first year and (2) a user questionnaire asking subscribers about their geographic usage needs. (Celcom Ex. 5, pp. 3-4.)

31. Celcom proposes a maximum of 220 voice channels in its initial five cell system and 706 voice channels to be phased in during the first four years after grant of the construction permit. (Celcom Ex. 4, Appendix B.) Celcom appears to have placed its cells as nearly as possible on the expansion grid. (Celcom Ex. 4, Map 1.) Celcom proposes a 0.05 grade of service (GOS) during the busiest hour of the day at each cell site and 0.01 during non-busy hours. (Celcom Ex. 1, p. 4.) Celcom calculated its GOS based upon Erlang B traffic tables with a 0.026 erlangs load per subscriber. (*Id.*)[10] Celcom proposes to add channel capacity when any cell experiences a 5% blocking rate on any five consecutive business days, or on any four days in a 20-day period. (Celcom Ex. 6, p. 3.) Celcom's proposed system has sufficient capacity to handle its fourth year demand forecast of 22,500 subscriber units. (Celcom Ex. 5, p. 2; CTC R. Ex. 54, p. 3.)

32. CTC proposes to construct a 49 cell site system. (CTC Ex. 42R, pp. 8-12.) CTC will employ Motorola DYNA T-A-C equipment with a single Motorola EMX-500 switch in the initial first year system. (CTC Ex. 36, pp. 4-5.) CTC's first year frequency plan is based on a 12-cell omnidirectional reuse pattern. (CTC Ex. 42R, pp. 6-24.) As the system expands after the first year, CTC will employ a 4-cell reuse pattern with 60° sectors. The 4-

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allocated to the cell are divided among the sectors. Thus, subscribers in a sectorized cell have available for their use the channels that are assigned to the sector they are in.

[10] Grade of service is a measure of the probability that, during a specified period of peak traffic (that hour within a 24-hour period in which the most calls are placed and/or received), a call offered to a group of trunks or circuits will fail to find an idle circuit at the first attempt (i.e., the ratio of the number of uncompleted calls to the number of calls attempted in a specific one hour period). A .02 GOS, for example, means that during the busiest hour of the day, an individual has a 98% probability that his call will be either received or transmitted on the first try. In designing a cellular system, the designer uses grade of service objectives as well as peak or busy hour traffic to determine channel requirements. Other factors involved include adoption of assumptions concerning user habits including the number of calls made per hour and average call length. These assumptions have been reduced to mathematical formulas and resulting Erlang tables. The formula on which the Erlang B traffic tables are based reflects the assumption that the subscriber, finding all channels busy, will immediately hang up and disappear from the system for some specified time period.

cell reuse pattern will not be used by CTC until sectorization occurs. (CTC Ex. 32, Att. IV, App. I, pp. 1-8.) CTC's frequency plan employs 630 kHz channel spacing between channels at the same cell site. (CTC Ex. 42R, pp. 8-24.) CTC appears to have placed its cells as nearly as possible on the expansion grid. (CTC Ex. 42R, Map 2.)

33. CTC proposes a 0.02 GOS during the busy hour in each cell, assuming 0.026 erlangs of load per subscriber, based upon the Erlang B traffic tables. (CTC Ex. 32, Att. III, p. 1.) CTC will take action to reduce blocking when the busy hour GOS declines to 0.05 for 21 out of 30 days. (CTC Ex. 33, Att. 4, p. 15.) CTC proposes a first year system capacity of 482 voice channels to serve 9,500 subscriber units. (CTC Ex. 32, Att. III.) CTC's initial system can accommodate this entire demand in the first year of operation. (CTC Ex. 42, p. 11.)

34. CTC performed its own analysis of the potential for interference within its system, and by its own admission, CTC will experience an 18.1 square mile loss of coverage due to co-channel control channel interference. (CTC R. Ex. 53, p. 5.)[11]

35. Based upon its grade of service, CTC has not allocated enough channels for cells 22, 45, 46, and 48 to support the number of users CTC has predicted will subscribe in year one. (CMC R. Ex. I, p. 40.) Cells 45, 46, and 48 will need four voice channels each to accommodate 24 or 25 subscribers per cell. (*Id.*) CTC has allocated three voice channels to each cell. (CTC Ex. 42R, p. 12.) Cell 22 will need 8 voice channels to accommodate 90 users. (CMC R. Ex. I, p. 40.) CTC has allocated 7 voice channels to cell 22. (CTC Ex. 42R, p. 9.)

36. CMC proposes to construct and operate a 66 cell system which it believes is adequate to satisfy the fifth year projected demand. The system will be equipped during the first year to meet only first year demand. (CMC Ex. IV, p. 2.) CMC specifies 628 voice channels for the first year, and 3,180 voice channels for the fifth year. (CMC Report, p. 6; CMC Ex. IV, p. 15.) System capacity has been sized to provide service to 9,961 subscribers in year one. CMC proposes a 0.01 GOS for years 1 through 3, and a 0.05 GOS for years 4 and 5, assuming 0.026 erlangs per user load during the busy hour and using Erlang B tables. CMC proposes to take action to reduce blocking when the measured performance of any cell equals or exceeds 0.05 GOS for 21 out of 30 days, and will act to prevent service degrading to GOS 0.05 for the system as a whole. (CMC Ex. III, pp. 16-17.)

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[11] Celcom used a D/R analysis to predict interference in CTC's proposed system. (Celcom Ex. 16, pp. 13-16.) D/R is the radio of distance of separation for reuse between cell sites (d) to the nominal radius of the cells (R). Although use of this analysis is not determinative (see footnote 13, *infra*), Celcom's analysis does tend to show the closeness of the spacing of some of CTC's cells and the likelihood of some interference. (*Id.*)

37. In its first year of operation, CMC will operate its system in an omnidirectional mode. (CMC Ex. III, p. 20.) Cell site equipment for low density cells (cells 61-13 through 61-18) will consist of the Graphic Scanning Cell Site Controller and E.R. Johnson Base RF equipment. (CMC Ex. IV, p. 4; CMC S. p. 5.) Cell site equipment for high density cells will consist of Motorola DYNA T-A-C Base Site Controller and RF equipment. (*Id.*) The system design provides for multiple cell overlap concentrated in built-up areas such as downtown Manhattan. (CMC R. Ex. I, p. 6.) CMC's system was designed to serve New York City, Westchester County, Long Island and northern New Jersey, all expressways including the Long Island expressways, and main traffic arteries. (CMC Ex. IV, p. 1.)

38. Exhibit III of CMC's Direct Case describes the methodology CMC used in designing its New York system. (CMC Ex. III, p. 20.) CMC asserts that for a nominal cell radius of 11 miles, typical separation for frequency reuse should be about 48 miles between cell centers if omni transmit is involved at both ends. (*Id.*) If both cells are using sector transmit, the distance is nominally 38 miles. (*Id.*) CMC intends to reuse control channels at distances of less than 20 miles in 40 separate cell pairs. (Celcom R. Ex. 16, p. 4.) The cell pairs, and the distances are as follows:

Cells	*Distance Between Cells (miles)*	*Cells*	*Distance Between Cells (miles)*
61004 and 62016	11.0	61002 and 62026	19.6
62012 and 62019	8.4	62018 and 62026	15.6
62012 and 62033	10.5	62026 and 63002	14.0
62019 and 62033	12.4	62010 and 62024	12.4
62002 and 62014	6.4	62010 and 64001	18.9
61012 and 62007	10.0	62024 and 64001	19.8
62015 and 64003	14.0	61008 and 62027	17.9
62013 and 65002	12.7	62003 and 62017	6.3
62008 and 62032	16.8	62027 and 62003	5.3
62021 and 63001	18.2	62017 and 62027	9.5
62021 and 64005	14.9	61001 and 62011	10.3
63001 and 64005	18.0	61001 and 62025	14.1
61006 and 62029	16.2	62011 and 62025	5.1
62001 and 62006	9.4	62011 and 64002	18.9
62001 and 64007	16.9	62011 and 65001	13.1
62006 and 62029	12.6	62025 and 62030	16.9
62009 and 63003	14.5	62025 and 64002	14.3
62004 and 62020	5.4	62025 and 65001	10.2
61007 and 62031	19.1	62030 and 64002	18.4
61002 and 62018	14.5	64002 and 65001	8.1

(*Id.*)

CMC has not adhered to its stated criteria for cell placement: (CMC Ex. III, p. 20; Celcom R. Ex. 16, p. 4.) Thus, when subjected to its own

standards, it appears likely that CMC's first year system will suffer significant co-channel control channel interference problems. (*Id.*) Furthermore, CMC's cell sites do not seem to be placed uniformly upon an expansion grid. (CMC conforming amendments, filed April 16, 1983.)

Service to Roamers

39. Celcom will offer service to two types of roamers: the overflow subscribers to the New York wireline system and subscribers to other systems traveling to New York. (Celcom Ex. 9, p. 1.) Celcom intends to maintain an exchange of subscriber information with the wireline carrier. (*Id.*, at p. 2.) Roamers will register with the system for originating and receiving calls, at which time a local number will be assigned. A Celcom user must either notify the Celcom system when the first call is initiated each time the user enters the system's service area, or the user must notify the home switch which will, in turn, notify the Celcom system. (*Id.*, at p. 2.) Finally, Celcom intends to establish a central computerized clearinghouse which will be available to all cellular operators. The clearinghouse will have three primary functions: (1) to forward calls; (2) to charge and credit the affected systems and their subscribers; and (3) to act as a credit information clearinghouse. (*Id.*, at p. 3.)

40. CTC intends to implement fully automatic roamer service. (CTC Ex. 13, p. 7; CTC Ex. 19, p. 2.) In the event that national and intersystem arrangements for fully automated service to roamers are not available prior to the commencement of service, CTC will provide operator assisted service to roamers. (CTC Ex. 19, p. 2.) Basic service will be provided to any roamer who has registered in advance with the business office of the appropriate cellular system operators. Under these circumstances a roamer will be assigned a new temporary directory number for a specified period of time. (CTC Ex. 33, p. 3-9.) Another type of service called Limited Access will be provided to those subscribers who are in good standing in their home areas and where agreements exist between cellular system operators for revenue-sharing information. Roaming subscribers will be able to place calls within the roaming system but will need operator assistance to receive a call. Call charges will be forwarded to the home cellular system carrier. (CTC Ex. 33, pp. 3-9 to 3-10.) In cases where a high incident of roaming traffic between two areas exists and the appropriate interconnect and revenue sharing agreements can be realized by the respective cellular system operators, fully automatic roaming service will be provided. (CTC Ex. 33, p. 3-10.) Service will be denied entirely to roaming subscribers if they are on a nationwide list of subscribers whose service has been rescinded for unauthorized use or theft of equipment, nonpayment of service fees, or other reasons. (CTC Ex. 33, p. 3-11.)

41. CMC proposes fully automatic roamer registration. (CMC Ex. VI, p. 7.) Registration consists of an automatic call sequence that is executed by the subscriber equipment when it detects a system identification code on the control channel that is different from the one it has been using. (CMC Ex. III, p. 10.) A foreign subscriber will be registered in the CMC New York system under the local number assigned in his or her home system. Thus, when a local caller wishes to contact a roamer, the caller will first dial a single unchanging access number and, upon receipt of a second dial tone, dial in the foreign subscriber's home system local number. (CMC Ex. III, pp. 10-11; CMC Ex. VI, p. 4.)

Issue (c)

Expansion Plans

42. Celcom proposes to phase in its 22 cell system by constructing and operating five cells within the first year after receipt of the construction permit and expanding to 22 cells two years after grant of a construction permit. The order in which the cells will be constructed will be based on two factors: (1) further demand indications generated by the switch information concerning high usage in cells during the first year and (2) a user questionnaire asking subscribers about their geographic needs. (Celcom Ex. 5, pp. 3-4.)

43. Celcom will activate all 706 voice channels as its first means of expansion. (Celcom Ex. 6, pp. 3-4.) Celcom proposes to take corrective action in the event that service quality begins to fall below .05 GOS on any five consecutive business days or any four days in a 20 day period. (Celcom Ex. 6, p. 3.) The corrective action would be adding one channel, a group of channels, or reassigning unused channels from lightly used cells. (*Id.*, at pp. 3-4.) Celcom provides no further specific proposals for expansion, but urges in its findings that the nature of its proposal, i.e., fewer, more widely spaced cells than any of the other applicants avoid the problem of being locked in to a particular grid structure, and gives to Celcom alone the flexibility to adapt to the needs of the SMSA with minimum cost engineering modification. (Celcom PF, p. 28.)

44. CTC proposes an initial system of 49 cells using 482 voice channels to serve 9,500 subscriber units. (CTC Ex. 32, Att. III.) CTC states it intends to rely theoretically on five steps for expansion: adding new channels within reuse limits, channel borrowing from other cells, adding new cells, sectorization, and cell splitting. (CTC Ex. 33, pp. 4-1 to 4-47.) CTC anticipates that its single Motorola EMX-500 switch can handle up to 15,000 subscribers or have sufficient capacity until nearly the end of the second year of operation (at which time 9,500 subscribers are forecast) and considers that additional switches and assignments of cells to those switches is likely to be the first major expansion. (CTC Ex. 36, pp. 5-6.)

CTC plans to add base stations to both improve signal coverage and to add capacity. (*Id.*, at p. 8.)

45. The busy hour blocking rates in every cell in the CTC system will be monitored by the System Control Center. Whenever there is a sustained trend that clearly demonstrates that .02 GOS is not being maintained, plans will be made to add channels. (CTC Ex. 36, p. 8.) Initially, the entire system will use omnidirectional transmit antennas. Augmenting cell capacity will be achieved by sectorization or adding base station locations (cell splitting). (CTC Ex. 36, pp. 8-9.) CTC proposes an initial cell split as a part of its first year 49 cell system.

46. CTC has proposed a frequency plan for its future system. The plan is designed for a system of 91 cells with 4,715 channels capable of serving 76,502 units. (CTC Ex. 32, At. III.) Capacity is targeted for the area in which CTC expects growth to occur and the locations are shown on a future system expansion grid. (CTC Ex. 33, Att. III, p. 11.) The frequency plan indicates which cells will operate in the sectorized transmit mode. (CTC Ex. 42R, pp. 17-21.1.) CTC does not, however, provide a step-by-step procedure for how and when it would grow from its initial plan to its future system.

47. CMC will construct its initial system with the cell configuration (66 cells) adequate to accommodate fifth year demand. In the first year, CMC will allocate 628 voice channels and enough equipment to meet first year demand. (CMC S. p. 6; CMC Ex. IV, p. 2.) For the first five years of operation, CMC will expand its system capacity through the addition of cells, and the sectorization of existing cells. In the fifth year, CMC proposes to allocate 3,180 voice channels to accommodate 66,133 subscribers. (CMC Ex. IV, pp. 15-20.) CMC will employ a 4 cell reuse pattern. (CMC Ex. IV, pp. 18-20.) In CMC's initial operation all sites will operate in an omnidirectional mode. Initial implementation will not necessarily use sector transmit until subscriber traffic patterns have been determined. (CMC Ex. IV, p. 15.) CMC proposes full sectorization of all 66 cells by the fifth year. (CMC Ex. IV, pp. 15, 20-32.)

48. CMC proposes an initial grade of service for the first three years of 0.01, while years four and five reflect a 0.05 GOS. (CMC Ex. IV, p. 15.) Performance will be monitored and the blocking rate evaluated at regular intervals to verify that system service is within the grade of service over any 30 day period. (CMC Ex. IV, p. 20.) When 0.05 GOS is equaled or exceeded for any cell on 21 of the preceding 30 days, as measured in system operating data, the system will be analyzed for expansion of capacity. (CMC Ex. III, p. 16.)

49. CMC proposes to reuse control channels at distances of less than 20 miles in 40 separate cell pairs, in violation of its own stated standards regarding frequency reuse. (Celcom R. Ex. 16, p. 4.) There is evidence in

the record that shows even closer spacing for voice channels in the fifth year than the control channels. (Celcom R. Ex. 16, Tables 1-4.) While the D/R analysis performed by Celcom is not determinative (see footnote 13, *infra*) it does show the existence of close spacing of cells, and the likelihood of interference.

Issue (d)

Rates, Charges, Practices, and Classifications

50. The applicants propose to offer basic cellular service at the following recurring monthly rates:

	Celcom	*CTC*	*CMC*
Monthly Access Charge	$40.00 (includes 100 message units)	$25.00	$4.95

	Celcom		*CTC*		*CMC*	
Usage Per Minute	*1st Half Min.*	*Ea. Half Min. Thereafter*	*1st Min.*	*Ea. Min. Thereafter*	*1st Half Min.*	*1/10 Min. Thereafter*
Day	$ .40	$ .40	$ .35	$ .35	$ .14	$ .026
Evening	—	—	—	—	$ .10	$ .018
Night	$ .20	$ .20	$ .14	$ .14	$ .06	$ .01

(Celcom Ex. 13, Tariff, pp. 14-16; CTC Ex. 21, Tariff, pp. 29-30, 33-34; CMC Ex. VI, pp. 24-24a.)

51. Celcom proposes a monthly charge of $40 which includes 100 message units of time. (Celcom Ex. 13, p. 5.) One unit of air time is equal to one minute of use during peak hours (7 a.m. to 7 p.m.) and two minutes of use in off-peak hours. (*Id.*, at p. 14.) Celcom will offer a variety of service features including conference calling, call waiting, call forwarding, speed dialing, no-answer transfer and message storage and retrieval. (*Id.*, at pp. 15-16.) There will be a fee of $2 for registration of roamers, which will include a temporary number assignment, and a $2 a day charge for use of the number. For all other charges, roamers will be billed at the same rates as will local subscribers. (*Id.*, at p. 16.) If a roamer uses the system for seven consecutive days, the roamer will be treated as a subscriber and the roamer access charges incurred to date will be credited against the basic monthly fee. (*Id.*, at p. 14.)

52. CTC's basic service rate for each subscribing unit will be $25 per month. (CTC Ex. 21, Tariff, p. 30.) The basic charge does not include any air time usage. The usage charge will be $.35 per minute in daytime hours (7 a.m. to 6 p.m., Monday through Friday excluding holidays) and $ .14 at all other times. To promote resale, volume users (100 or more telephone numbers) will receive a 40% discount off the basic charge, but not off the air time usage charge. (*Id.*, at p. 33.) CTC proposes to bundle certain of its service features with its basic service. CTC's basic charge includes call

waiting, call forwarding, three-way conferencing, and no-answer transfer. (*Id.*, at pp. 4-5.) CTC proposes optional services: speed calling, access to enhanced service providers such as Telenet and data base services, and least cost toll routing service. (*Id.*, at p. 5.) CTC's tariff does not specify how roamers would be charged. The basic monthly service charge to roamers would be established by inter-carrier agreement. (*Id.*, at p. 30.)

53. CMC will assess a monthly access charge of $4.95, and a usage charge for the initial 30 seconds of each call and thereafter for each additional six seconds of air time. (CMC Ex. VI, p. 24a.) CMC has established a three-tier pricing schedule, called "prime" (7 a.m. to 8 p.m., Monday through Friday except holidays), "evening" (8 p.m. to 12 p.m., Monday through Friday; 7 a.m. to 12 p.m., Saturday and Sunday, and all holidays), and "night" (12 p.m. to 7 a.m., every day). The basic charge includes the following service features: clear voice, access to special information services, unlimited emergency calls, least cost toll routing, and operator assistance. (*Id.*, at p. 24.) Optional services offered at additional costs include call forwarding, delayed forward, call waiting, conference calling, secured voice, and store and forward voice. (*Id.*) Distant roamers will pay $3 per month plus an air time usage surcharge of $ .35 per minute. Local roamers will be subject to the same charges as the local subscriber. (*Id.*) CMC also proposes to offer data services to utilize ideal system capacity. (*Id.*, at p. 18.) CMC states it will promote resale of its cellular services but does not indicate how it will do so. (*Id.*, at p. 26.)

Maintenance and Personnel

54. In the first year following the grant of the construction permit, Celcom proposes a general manager and a technical staff of six including a chief engineer. They will be responsible for system operation on a day-to-day basis. (Celcom Ex. 11, pp. 5-6.) By year four, Celcom proposes to have a technical staff of 26. (*Id.*, at p. 6.) In addition, Celcom will subcontract for backup technical personnel and it will receive assistance from engineers from Harris Corporation, its equipment supplier. (*Id.*, at p. 7.)

55. Celcom has not specifically allocated its technical staff to switch or base station maintenance. Celcom states only that its maintenance plans are keyed to achieving its targeted grade of service. (Celcom Ex. 8, p. 1.) Celcom will rely on the features of its selected equipment for a part of its maintenance proposals. Celcom notes that its equipment supplier has provided redundancy for the paging transmitter and the locating and access receivers as well as diagnostic equipment at the base station and the central switch. The system is completely modular, making repair of any particular problem a matter of replacing the modular unit. (Celcom

Ex. 7, pp. 2-3; Celcom Ex. 8, pp. 2-3.) Celcom has classified system failures into two classes. Class 1 will require an immediate response and Class 2 will require a response within four hours. Any failure that results in an unacceptable grade of service will be classified as a Class 1 failure. (Celcom Ex. 8, p. 3.) Both visual and audio alarms will notify personnel at the central switch, which will be continuously manned, as to the failure, its class, and its location. (*Id.*, at p. 4.)

56. CTC proposes a first year system staff of 98 persons, including Management, Technical Department, Customer Relations Department, Marketing Department, Operations Department, and Administrative and Financial Departments. (CTC S. pp. 10-14.) CTC proposes a System Division which will be responsible for day-to-day installation, modification, repair and maintenance of all of CTC's technical equipment. (CTC Ex. 15, p. 21.) The Division will have an initial staff consisting of the Division's Manager and four system technicians. Three of the technicians will be outfitted with three vans with all necessary test equipment for the purpose of installing, modifying, maintaining and repairing equipment at the various cell sites. (*Id.*) The fourth technician will monitor the central switch during the day and at all times when changes affecting switching are being made. (*Id.*, at p. 22.)

57. CTC proposes a System Control Division with a staff of ten operators and one manager to monitor and operate the system's control terminals; to monitor all cellular system meters, indicators, and alarms; and to report any malfunction immediately to the technicians. Operators will be on duty 24 hours a day, 7 days a week. (*Id.*, at p. 16.) System malfunctions will be detected automatically by monitoring equipment at the system's operating and control centers. CTC's customers will have access to the system's 24-hour telephone number to report malfunctions in the event they are not detected at the system's operating and control centers. (CTC Ex. 17, p. 4.) At all times, the Technical Director, System Division Manager and all technicians will carry a cellular portable phone as well as a radio pager operating on an independent system so they may be contacted immediately in an emergency. (*Id.*) CTC states that the specific base station locations for the technical staff will be chosen to minimize travel time and distance to system cells. (CTC Ex. 17, pp. 2-3.)

58. CMC proposes a staff of 129 persons for the first year of its operation to carry out the functions of sales and customer service, network operations and maintenance, engineering and finance and administration. (CMC Ex. VII, App. VII-C.) Specifically, CMC proposes 23 RF/Digital technicians, 36 sales personnel, and 11 administrative personnel. (CMC S., p. 10.) CMC will have access to the resources and personnel of its corporate parent, Graphic Scanning which will provide technical, marketing, and management support. CMC's Vice President, Technical Services,

Mr. J. Douglas Wells, will be responsible for system planning, implementation, and expansion. (CMC Ex. VII, p. 2, App. A.) CMC's president is the General Manager responsible for overall operation. (*Id.*) All maintaining and repairing of the New York system will be performed by CMC's own local employees. (*Id.*, at p. 4.) Maintenance personnel will receive training before and after the system is implemented. (*Id.*, at pp. 25-27.)

59. The central switch will be attended 24 hours a day. Cell sites will be attended from system service centers. A complete system status evaluation encompassing all major hardware and software elements will be conducted daily through diagnostic routines. (CMC Ex. VII, p. 5.) Failures are detected through alarm messages and diagnostic printout on the local teleprinter. All cell site alarms which result in a deterioration of the grade of service will be serviced immediately. All other alarms will be serviced within two hours. (*Id.*) CMC has incorporated redundancy in critical aspects of its system. (CMC Ex. III, pp. 4-5; CMC Ex. IV, pp. 11, 13.) The EMX Mobile Telephone Exchange is redundant in all components and functions necessary to assure reliability. (CMC Ex. III, p. 4.) The reliability goal for the exchange is a maximum down time of 2 hours in 10 years. (CMC Ex. IV, p. 11.) CMC plans to have standby power at its switching equipment and cell sites containing more than four voice channels. (CMC Ex. IV, p. 7.) Cell sites critical to satisfactory overall service will be equipped with battery backup. (*Id.*)

60. Celcom proposes to use a central switch and cell site controllers supplied by Anaconda Ericsson. (Celcom Ex. 7.) The equipment will have duplication of certain key pieces of equipment as well as diagnostic features. (Celcom Ex. 7, p. 1.) The equipment will provide redundancy at the cell site for the paging transmitter and the locating and access receivers. (*Id.*, at p. 2.) Self-diagnostic equipment will be installed at the cell sites, and interconnection of the cell sites to the central switch will be redundant. (*Id.*, at p. 3.)

61. CTC's initial system will employ Motorola DYNA T-A-C cellular equipment. (CTC Ex. 32, pp. 19-22.) CTC's equipment will be redundant to insure operational reliability. (CTC Ex. 17, pp. 3-4.) CTC's initial system will be controlled by a single Motorola EMX-500 switch. The capacity of the switch is approximately 15,000 customers. Additional switches are contemplated in CTC's long-term design and will be installed at multiple locations in the modified New York SMSA when necessary. (CMC Ex. 36, pp. 4-6.)

62. CMC will use the Motorola EMX Mobile Telephone Exchange at its central switching facility. CMC will initially install one EMX; as the system expands, additional switches will be added, resulting in a fifth year complement of five switches. (CMC Ex. IV, pp. 3-4; CMC S., pp. 4-5.) Motorola DYNA T-A-C Base Site Controllers and RF equipment will be

installed at all cells except 61-13 through 61-18. (CMC Ex. IV, p. 4; CMC S., p. 5.) Cells 61-13 through 61-18 will be equipped with Graphic Scanning Cell Site Controllers and E.F. Johnson RF equipment. (*Id.*) Both types of equipment contain self-test and diagnostic capabilities. (CMC Ex. IV, pp. 3-4; CMC S., pp. 4-5.)

Conclusions

Issue (b)[12]

63. Issue (b) involves the comparison of the geographic areas which the applicants propose to serve, the relative demand for service in those areas, and the ability of each applicant's proposed system to accommodate the anticipated demand for local and roamer service. The Commission has determined that the geographic area to be served is a major factor of comparison. *Cellular Communications Systems*, 86 FCC 2d 469, 502 (1981) (*Report and Order*). In comparing proposed service areas, consideration shall be given to the presence of densely populated regions, highways, and other areas likely to have high mobile usage characteristics as well as indications of substantial public need for the services proposed including the results of public need surveys. (*Id.*)

Geographic Area and Population

64. The geographic area that an applicant proposes to serve includes that area within its proposed 39 dBu contours falling within its proposes CGSA and the relevant SMSA. *Designation Order*, *supra*, at para. 44, footnote 29. All of the applicants propose to serve the major population and employment centers such as New York City and the close-in suburbs of Long Island, New Jersey and Westchester County. CTC's 39 dBu coverage will provide service to 91.4% of the geographic area of the New York modified SMSA. CMC's proposed system will cover 74.6% and Celcom will cover 71.2%. CTC's 3,491 square miles of service will serve an estimated 14,557,028 people or 99.0% of the total New York modified SMSA; CMC's coverage of 2,847.5 square miles will serve an estimated 14,275,177 people or 97.1% of the New York modified SMSA; Celcom's coverage of 2,719 square miles serve 13,853,291 people or 94.3% of the New York modified SMSA.

65. CTC proposes to serve 17% more of the area of the modified SMSA and 2% more population than CMC, and 20% more area and 5% more population than Celcom. CTC will provide service to areas not served by either CMC or Celcom. These include a 390.6 square mile section of Putnam and northeastern Westchester Counties with an estimated population of 126,715 and portions of highways I-84, I-684, the Taconic State Parkway, U.S. 6, SR 172, SR 117, and SR 52; a 10.5 square mile

[12] Issue (a) has been resolved. See para. 3, *supra*.

section of eastern Westchester County with an estimated population of 6,359 and portions of U.S. 1, the Hutchinson River Parkway, and the I-95/I-287 interchange; and a 321.8 square mile area of northern New Jersey marked by residential areas, significant commercial activity, and significant traffic volumes on portions of highways I-78, I-287, I-80, U.S. 22, U.S. 46, and U.S. 206. Additional areas of significance include two pockets in eastern and southern Suffolk County with areas and populations of 48 square miles, 8,619 people and 23.5 square miles, 18,261 people, respectively. Both areas include portions of state highways not covered by the other applicants.

66. CMC has two unique pockets of service: a 59.8 square mile area located on the north shore of Suffolk County covering some 28,876 people and portions of three state highways, and an area of 1.2 square miles covering portions of Robert Moses State Park on Fire Island. These areas are not so significant as CTC's coverage advantage in other areas of the SMSA. Celcom has no unique pockets of service and in addition fails to cover significant areas of Westchester County, northern New Jersey, and Long Island that have high concentrations of town and residential areas, highways, and commercial activities covered by the other two applicants.

67. Both CMC and Celcom will experience significant gaps in their service and will have hand-off difficulties which will not be experienced by CTC. CMC has one isolated cell in the southwest region of the SMSA. Celcom has a cluster of two cells in Westchester County which are isolated from the rest of the system and an internal gap of coverage between cells 9, 10, 15, and 16 in the area of Fairfield, New Jersey. CMC's gaps affect the handoff in New Jersey on highways I-287, U.S. 22, and I-78. A Celcom gap in Westchester County affects the handoff on Route 128, the Taconic State Parkway, the Saw Mill River Parkway, and I-684. Celcom's interior gap in New Jersey affects the handoff on I-280, I-80, U.S. 46, and Route 24. In addition there are several highways on which a traveler would lose contact with Celcom's system because of insufficient overlap between cells. These are two sections of Route 25 on Long Island, one and two miles long; two sections of Route 27 on Long Island, three miles long and a quarter mile long; a two mile section of Route 107 on Long Island; and a half mile section of Route 24 in Westchester County. CTC's only loss of coverage would be on the causeway at Robert Moses State Park on Fire Island.

68. Celcom argues that CTC's superior coverage has been achieved by providing cells in areas that CTC projects will have very few initial subscribers. However, the demographic data respecting the pockets of unique CTC coverage indicates high residential population, commercial activity, and major highways. Although demand in these outer areas will be less than for the central areas, CTC's demographic data supports its

conclusion that demand for cellular radio service in these areas exists and should be accommodated. In light of CTC's superiority of coverage of the area and population of the New York modified SMSA it will receive a comparative preference under this aspect of issue (b).

Relative Demand for Service

69. The Commission has required comparative consideration of each applicant's showing of the extent of demand for cellular radio service in individual markets. *Report and Order*, *supra*, at pp. 502, 503. Each of the applicants has conducted market research to determine the relative demand for cellular radio service in New York. CTC will be accorded a comparative preference under that aspect of issue (b).

70. Celcom states that it used a common sense approach at arriving at subscriber estimates in relying on the experience of its management. In following this approach, Celcom failed to provide sufficient basis for its estimates to make them creditable. The market survey used to provide information relating to cellular radio demand and need was not intended to be a statistically valid study or to produce a sales forecast of subscribers. It was conducted only of New York City businesses and excluded almost 50% of the population of the New York modified SMSA; although it purported to use a sample frame developed by KBKL, it surveyed a range of businesses different from the sample frame. Neither the questionnaire used for the study nor the information which Celcom gave to respondents has been provided.

71. CMC's surveys contain several deficiencies. CMC's basic assumptions are that pager users and businesses will be the primary users of cellular radio and it restricted its surveys to those groups. Those assumptions are unsupported. As a result, CMC's sample groups were limited and, for example, precluded personal users of cellular radio from consideration without adequate explanation. Second, CMC apparently used the six surveys not to project demand, but to place the New York market into one of three intervals. A market falling into the first interval has a projected need factor of .0045 cellular units per one thousand population. The nexus between the results of the surveys and the categorizing of New York into the first interval is not established and the need factors of each interval have no demonstrated basis. CMC also failed to explain how its estimated year five demand was distributed down to years one to four and how its demographic data was used to project models of cellular usage.

72. CTC conducted three surveys, two of which were used to project demand. The two surveys drew respondents from the entire SMSA and included both businesses and households with incomes of at least $35,000 or more. The questionnaire CTC used contained all the information

necessary to establish its reliability. Criticisms lodged by the other parties that the respondents may have been confused by whether the questions referred to business or personal use, or by having to do some mental addition, are only speculative. Further, CTC detailed the methodology by which it forecast demand in the New York area. Finally, CTC performed a demand distribution study based on traffic flow information to distribute demand cell-by-cell. CTC is criticized for rejecting persons answering as "possible" users; because its low number of acceptors affected the reliability of the projection; and because its assumption of only a 36% share of the market is inaccurate. CTC's choice to exclude "possible" users from its results was reasonable and within accepted market survey practice, as well as its finding of only a 36% market share. The reliability of its surveys are derived from the size of the samples, not the number of positive responses. The criticism lodged against CTC, to the extent that they have validity, do not appear to be fatal to the conclusion that CTC has performed a reasonably reliable study of the New York market on which a cellular radio system could be designed, has demonstrated a relationship between its demand projections and the market research, and is deserving of a comparative credit.

Ability to Accommodate Anticipated Demand

73. All the applicants have designed systems with cells covering New York City and most of the close-in suburbs. However, both the Celcom and CMC systems display serious design flaws. CTC's system also suffers from flaws, but they are less serious than Celcom's or CMC's. Accordingly, CTC will be awarded a slight preference for this portion of issue (b). Celcom's initial system will have 5 cells in the first year after grant of the construction permit and 22 cells in the second year. Celcom does not indicate how many voice channels would be assigned to the initial 22 cell system, but states that by the fourth year it will have allocated 706 voice channels to accommodate 22,500 subscribers. Although Celcom can be credited with the ability to accommodate fourth year demand, its ability to accommodate initial demand is unverifiable without a channel plan and a first year demand forecast. Second, Celcom's design has created numerous situations where hand-off on major arteries will be difficult or may not occur at all. In Westchester County, cells 21 and 22 are isolated from the rest of the system, resulting in 3-5 mile gaps on portions of the Taconic State Parkway, the Saw Mill River Parkway, I-684, and Route 128. In Fairfield, New Jersey there is an internal gap between cells 9, 10, 15, and 16 resulting in 2-5 mile loss of coverage of I-280, U.S. 46, and I-80, and small gaps involving Routes 23 and 24. Further, throughout Celcom's system there are other areas where the cells overlap insufficiently to maintain continuous coverage of certain roads, such as Route 25 and SR

27 on Long Island. As a result of these deficiencies, it is likely that travelers through Celcom's system will experience significant disruption in service.

74. CMC proposes 66 cells in its first year plan, with channel allocations and equipment sufficient to satisfy a projected initial demand of 9,961 subscribers. Its system is designed with a high concentration of cells in the downtown area. By CMC's own stated criteria as set forth in Exhibit III of its Direct Case, for a nominal cell radius of 11 miles, typical separation for frequency reuse is about 48 miles between cell centers if omni transmit is involved at both ends. If both cells are using sector transmit, the distance is nominally 38 miles. However, CMC proposes to reuse control channels at distances of less than 20 miles in 40 separate cell pairs, thereby creating the likelihood of extensive interference. This conclusion concerning the likelihood of interference is not an adoption of a standard to the preferred system design, but represents a finding, based on the evidence, that CMC's system does not meet its own standards for interference free design.[13] CMC urges that concentration of cells downtown is important to provide depth of coverage. CMC alleges that coverage depth has the benefit of providing multiple paths for subscriber access from a given location, greater flexibility in accommodating demand through shifting multiple cell capacity to the overlap area, and enhancement of service in areas with dense concentration of large buildings and tunnels especially in the heavily built-up New York area. Depth of coverage is not encompassed by any issue in this proceeding. In *Report and Order*, the Commission ignored it as a basis for comparative analysis. Assuming depth of coverage to be a valid comparative standard, CMC has not demonstrated that it would cover any important area not covered by CTC. CTC serves 2,675 square miles where 3 or more cells overlap; CMC serves 2,068.4 square miles. CMC's superiority occurs in

[13] Celcom performed an interference analysis based upon D/R ratios; CTC performed an interference analysis based upon 25.8 dB C/I ratios and 36.8 db C/I ratios; CMC performed an interference analysis based upon 17 dB C/I ratios; and the Separated Trial Staff asserts that the applicable standard for determining harmful interference is 25.8 dB C/I. (Celcom R. Ex. 16; CTC R. Ex. 53; CMC R. Ex. 1; STS PF, p. 21.) Under Section 22.903(c) of the Rules, applicants must comply with Section 22.504 of the Rules and F.C.C. Report No. R-6406 "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service" by Roger B. Carey (Carey Report). The Carey Report adopts neither D/R nor C/I ratios, but establishes as the point of comparison the proposed 39 dBu contours. None of the parties has presented sufficient and persuasive evidence to compel acceptance of an alternative technical standard potentially in conflict with expressly adopted standards. These findings are based on the principle that the spacing between cells should follow as uniform a pattern as possible to achieve optimal coverage with minimal intrasystem co-channel interference. This principle has been recognized by all the applicants. (CMC Ex. III, pp. 18-19; CMC Ex. IV, p. 13; Celcom R. Ex. 15, pp. 6-7; CTC Ex. 42, p. 11.)

areas served where 5, 6, or 7 cells overlap. CMC has not shown how this increased concentration improves coverage. Nor has it addressed the interference that its system will suffer. Finally, it has an isolated cell in New Jersey which will cause hand-off problems over portions of major highways such as I-287, U.S. 22, and I-78.

75. CTC has proposed a 49 cell system with channel allocations of 482 voice channels to meet a projected initial demand of 6,000 in the first year and 9,500 in the second year. CTC has acknowledged some interference within its system which would result in a loss of service to 18.1 square miles. Allegations by Celcom that CTC would be subject to greater interference, although based on a D/R analysis which is not determinative (see footnote 13, *supra*), do tend to indicate that some interference will result. In addition, CMC has shown that at cells 22, 45, 46, and 48, CTC will need to allocate one additional voice channel each to accommodate demand at CTC's stated grade of service. These difficulties in CTC's system are serious but on a far lesser scale than those present in the Celcom and CMC systems. CTC's 18.1 square mile loss due to interference is far less than that which CMC will experience, and it appears that CTC's subscriber capacity problems at four cells can be alleviated by the addition of one voice channel each, a step CTC states it would take if its grade of service deteriorates. CTC's highway coverage is superior to both applicants and it encounters no significant hand-off problems. Therefore, CTC will receive a slight comparative preference.

Service to Roamers

76. Both CTC and CMC propose automatic registration of roamers, while Celcom proposes manual registration, or pre-registration through the roamer's home system. Although it is a desired feature, automatic registration depends on intrasystem arrangements which remain speculative at this time. Therefore no preference will be awarded on that basis.

77. CMC deserves a slight preference for proposing the use of a single unchanging local roamer access number followed by the roamer's home system number. Such a proposal will allow a roamer in CMC's system to be dialed directly by a local caller without securing an assigned temporary directory number from the system operator. None of the parties are superior to CMC on the basis of the rates they intend to charge roamers. CTC has reserved any commitment on roamer charges pending intersystem agreements. It cannot be said, therefore, whether CTC's rates will be an incentive or a disincentive for roamers. Celcom's intention to treat roamers who stay in their system for over seven days as local subscribers may be a disincentive to roamers who may on their eighth day in the system be faced with paying the entire monthly access charge of $40. CMC proposes to treat local roamers the same as subscribers and will

charge $4.95 a month. Distant roamers will pay $3 per month plus an air time usage surcharge of $ .35 per minute. CMC's rates, therefore, appear to be nondiscriminatory toward roamers. Overall, CMC is entitled to a moderate preference for its service to roamers.

78. CTC has been awarded a comparative preference for its superior area and population coverage, its studies to determine relative demand for cellular radio service, and a slight preference for its ability to accommodate local demand. CMC has been awarded a moderate preference for its service to roamers. However, CMC's preference for its service to roamers is strongly outweighed by CTC's comparative superiority in the other areas. Overall, a substantial comparative preference is awarded to CTC under issue (b).

Issue (c)

Expansion Plans

79. This issue requires a comparison of each applicant's proposal for expanding its system capacity to meet anticipated increasing demand for service. The *Designation Order* directs that preference should be given to designs entailing efficient frequency use including not only the applicant's plans for cell splitting and additional channels, but the capacity for frequency reuse, and the applicant's ability to coordinate the use of channels with adjacent or nearby cellular systems.[14]

80. The expansion plan of CTC is superior to those of the other two applicants and deserving of a comparative preference. Celcom's expansion plan is clearly deficient. Its specific steps for expansion are limited to the first four years of operation and consists only of the placement of up to 22 cells and up to 706 voice channels. Beyond its fourth year of service, Celcom has no expansion plan other than adding more voice channels or borrowing voice channels from lesser used cells. Celcom's claim of superior expansion capability (because it is not locked into a particular grid structure) is diminished by its incomplete showing of the methods it would use to expand its system.

81. CMC's expansion plan states the essential elements of expansion. However, the problems with its initial system will be exacerbated as channels are added and system use increases. CMC's plan is to use 66 cells initially and in the fifth year. It will therefore remain configured with an isolated cell in New Jersey, with its hand-off problems. Further, CMC's design is marked by a concentration of closely-spaced cells in the New York City area. Because of close spacing, CMC intends to reuse control channels at distances of less than 20 miles in 40 separate cell pairings. Such distances are much less than what CMC asserts are necessary for frequency reuse. To alleviate this increasing interference, extensive re-

[14] See, *Designation Order*, para. 44, note 30, and *Report and Order*, at 503.

engineering will be necessary. Accordingly, CMC's expansion plan is comparatively inferior.

82. CTC has presented a general plan which will allow for the expansion of the system in a coordinated manner. The proposal demonstrates an understanding of design principles; it employs all the known methods for achieving expansion, including adding equipment, adding channels, channel borrowing, sectorization, and cell splitting. CTC describes a future system of 91 cells with 4,715 channels to serve 76,502 subscriber units. CTC has not shown step-by-step how it intends to grow from its initial system to the future system. But CTC is not locked into a 91 cell system. CTC's future system can be taken as an example of how CTC intends to expand and in that sense, it illustrates CTC's understanding of cellular radio expansion principles. It is superior to Celcom's expansion plan because it displays all the methods for expansion available to a provider of cellular service; it is superior to CMC's plan because it will not have extensive interference problems.

Issue (d)

83. Pursuant to this issue, a determination must be made on a comparative basis of the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities. In its *Report and Order*, the Commission explained that while they are relevant, these areas of comparison will be generally less significant than those contemplated under issues (b) and (c). The Commission noted that the adequacy of base station and switching facilities and related maintenance proposals may be an issue in comparative proceedings in some cases, but it is not expected that this will be a significant issue in general. The Commission also noted that personnel and practices will be significant only to the extent that they affect an applicant's ability to implement its proposal.

Rates, Charges, Practices, and Classifications

84. CMC will receive a preference for its proposed rate structure. CMC's proposed monthly access charge of $4.95 is $20 less than CTC's proposal and $35 less than Celcom's. Celcom has bundled 100 message units (100 to 200 minutes of air time) into its access charge which is likely to either discourage usage-sensitive customers from subscribing or to encourage the indiscriminate use of the system (although Celcom has provided an incentive for customers to use its 100 message units during off-peak hours). Similarly, CTC has bundled several customized services into its monthly access fee, which subsidizes high usage subscribers.

85. Another factor which affects system usage is incremental billing times. In the initial stages of cellular development, it is particularly

desirable to minimize the incentive to subscribers to extend air time used per call. CMC proposes 6 seconds incremental billing after the initial 30 seconds of each call, Celcom proposes 30 seconds incremental billing, and CTC proposes 60 seconds incremental billing. CMC comes closest to the goal of billing only for actual time used.

86. CMC's three-tiered pricing structure is preferable to the two-tiered pricing structures proposed by the other two applicants, because it is more of an incentive to the subscriber to use the system during off-peak hours. Both CMC's and CTC's proposal to offer data services to utilize off-peak capacity will also result in the more efficient use of available spectrum.

87. CTC claims a preference for its proposal to promote resale by offering volume users (100 or more telephone numbers) a 40% discount off the basic monthly charge. As it is the only applicant to make a proposal in this regard, it will receive some credit. However, overall, CMC deserves a comparative preference for its rate structure because it will result in a more efficient and economical use than rates proposed by either Celcom or CTC.

Maintenance, Personnel, and Facilities

88. Personnel proposals are significant only to the extent that they affect an applicant's ability to implement its proposal. All of the applicants have established a management structure for their systems and all rely to some extent upon the expertise or personnel resources of their corporate parent or constituent partners. No preference will be awarded to any of the applicants on the basis of personnel proposals. None is likely to so clearly enhance the applicant's ability to implement its proposed service that a preference must result.

89. No preference will be awarded to any applicant on the basis of its maintenance proposal. Each applicant has presented a maintenance plan which is acceptable. All have proposed systems which incorporate redundancy in critical equipment, continuous system monitoring with personnel and alarm systems, routine maintenance, and trained technicians to make repairs that affect system grade of service as quickly as possible. There is no persuasive evidence on which to conclude that one proposal is significantly superior to the others.

90. No preference will be awarded to any applicant on the basis of its proposed facilities. All three applicants have proposed technically acceptable facilities and each has the ability to construct cellular radio systems technically capable of providing high quality service.

Ultimate Conclusion

91. CTC has received a substantial comparative preference under issue (b) for its proposed geographic area and population, its studies to

determine relative demand, and its ability to accommodate local demand. CTC has also been awarded a comparative preference under issue (c) for its proposal concerning system expansion. Although CMC has received a comparative preference for its proposed rates and charges, and a moderate preference for its proposed service to roamers, these preferences do not outweigh the substantial preferences accorded to CTC under issues (b) and (c). Thus, it is concluded that, on a comparative basis, CTC's application is superior to both Celcom's and CMC's and that the public interest, convenience and necessity will be better served by a grant of the CTC application and a denial of the applications of both Celcom and CMC.

Accordingly, IT IS ORDERED that the application of Cellular Telephone Company for a construction permit to establish a new cellular system operation on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the New York, New York modified Standard Metropolitan Statistical Area IS GRANTED and the applications of Celcom Communications Corporation and Cellular Mobile Corp. ARE DENIED.[15]

IT IS FURTHER ORDERED that the grant to CTC is conditioned upon its obtaining the appropriate antenna structure clearances.

FEDERAL COMMUNICATIONS COMMISSION

FREDERIC J. COUFAL, *Administrative Law Judge*

[15] Pursuant to the *Designation Order*, exceptions to this Initial Decision, under Section 1.276 of the Commission's Rules, shall be taken directly to the Commission. In the event that exceptions are not filed within 30 days after the release date of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Female Ownership-Participation, Comparative Credit for
Minority Ownership, Factor in Comparative Proceeding
Programming Comparison
Reciprocal Service
Remand

Review Board remands comparative FM broadcast proceeding and adds issues on reciprocal service (Section 307(b)) and special sensitivity to minority and/or female needs and viewpoints. Nevertheless, programming evidence may only be considered in relation to the added issues if applicant makes the requisite "threshold showing" and seeks a separate programming issue.
—*Chase Communications Co.*
MM Docket No. 83-554

FCC 85R-33

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
James P. Chase, III, d/b/a Chase Communications Co. Killeen, Texas	MM Docket No. 83-554 File No. BPH-810827AK
Roy J. Smith, Euna E. Hardaway, F. Beth Zeiss d/b/a Harker Heights Communications Harker Heights, Texas	MM Docket No. 83-556 File No. BPH-820415AK
Killeen Communications, Inc. Killeen, Texas	MM Docket No. 83-559 File No. BPH-820415BH
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1985; Released: April 23, 1985

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Chase Communications Co. (Chase) and Harker Heights Communications (HHC) for authority to construct a new FM broadcast station to operate on Channel 288 at Killeen or neighboring Harker Heights, Texas, respectively.[1] In an *Initial Decision* (*I.D.*), FCC 84D-72, released October 12, 1984, Administrative Law Judge John M. Frysiak (ALJ) granted HHC's application after awarding it a decisive Section 307(b) preference for bringing a first local aural transmission service to Harker Heights.[2] Although not decisional, the ALJ also found HHC superior on the contingent comparative issue based on a weighing of the applicants' relative qualitative enhancements under the integration of ownership and management factor.[3] The proceeding is now before the Review Board on exceptions filed by Chase and HHC's reply. Oral argument was heard on March 1, 1985. We find that this proceeding must be remanded to the ALJ to consider both Chase's proffered "reciprocal service" showing as part of the Section 307(b) issue and to consider its claim of special "minority sensitivity" in the qualitative enhancement evaluation under the contingent comparative issue. Our reasons follow.

2. To begin, in a pre-"B" cut-off date amendment, Chase proposed "to provide co-equal, primary service to both Killeen and Harker Heights . . . and to originate local programming from main studios located in each of the two communities." Chase stated that, if its application were granted, it would apply pursuant to 47 CFR §73.1201(b)(2) for dual community identification as "Killeen/Harker Heights," and it also requested consideration under the reciprocal service doctrine as set forth in *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603, 2607-2608 (1961). *See* Chase Amendment filed September 16, 1982, Exh. 7, at 3. Under the latter doctrine, an applicant for a less-favored community (under Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b)), may be entitled to receive comparative consideration with a competing applicant for the favored community, provided that it: (1) maintains "primary

[1] The third applicant, Killeen Communications, Inc., did not except to the *Initial Decision*'s denial of its application; accordingly, we will dismiss its application with prejudice for failure to prosecute. *See* 47 CFR §1.276(f).

[2] The ALJ found that Killeen, by comparison, already has commonly-owned commercial broadcast Stations KIIZ and KIXS-FM, as well as non-commercial Station KNCT-FM, licensed to it. *I.D.*, paras. 8, 41.

[3] Chase, which was awarded 100% fulltime integration credit, and HHC, which received 98% credit, were found to be essentially equal under the quantitative aspect of the integration factor. *I.D.*, paras. 44-45 & n.6. No differences between the applicants were found under the comparative factor of diversification of mass media control. *ID.*, para. 43.

service" to the favored community (*see* 47 CFR §73.315(a)); and (2) meets the same requirements imposed on the applicant for the favored community by Sections 73.1125 and 73.1130 of the Rules, 47 CFR §§73.1125 and 73.1130, insofar as main studio location and program origination. *See id.*; *Public Service Broadcasting of West Jordan, Inc.*, 97 FCC 2d 960, 962 n.5 (Rev. Bd. 1984), *review granted in part and affirmed*, FCC 85-105, released March 8, 1985 (Comm'n).[4] At the hearing, Chase proffered an exhibit which reaffirmed the reciprocal service proposal made in its September 16, 1982 application amendment, but which amendment the ALJ rejected as "beyond the scope of this hearing." *Compare* Chase Exh. 8, at 1-2, *with* Tr. 184-185 (Vol. V, January 5, 1984).[5] In its exceptions, and while challenging the *I.D.*'s award of a decisive Section 307(b) preference to HHC, Chase claims that the ALJ erred in not considering its reciprocal service showing; it states that, because it proposes "to locate a studio on the boundary, contiguous to both Killeen and Harker Heights," it does "not require a waiver of the main studio or programming rules." Chase Exceptions at 17 & n.30.

3. We find that Chase had timely made, at least, a *prima facie* showing of reciprocal service. Its September 1982 amendment proposed "primary service" to Harker Heights, and it claimed compliance with the Commission's main studio location and program origination rules with regard to that community. The ALJ rejected Chase's hearing exhibit, which exhibit contained mostly proposed programming information as well as its reciprocal service showing. The ALJ gave no indication on the record that he had specifically considered the reciprocal service material. Because a successful showing by Chase could overcome the ALJ's award of a decisive Section 307(b) preference to HHC, we are remanding this proceeding to the ALJ for a full exploration as to whether Chase has satisfied the *Kent-Ravenna* requirements, *supra*, and for reexamination of the Section 307(b) issue in light of his additional findings.[6]

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[4] The Board recently examined the reciprocal service doctrine in historical context and found that it had ceased to serve the public interest and should henceforth not receive "any serious consideration ... in Section 307(b) determinations." *Kaldor Communications, Inc.*, 98 FCC 2d 292, 297, 298 (Rev. Bd. 1984). Although the Commission subsequently repealed the doctrine on a prospective basis and stated its agreement with the Board that the doctrine lacks "true public interest substance," it nevertheless made clear that the reciprocal service doctrine should be given full consideration in proceedings — such as this one — which were already ongoing. *Public Service Broadcasting of West Jordan, Inc.*, FCC 85-105, *supra*, paras. 4-5 & n.2. In the *Public Service* case, the Board — despite *Kaldor* — fully considered the doctrine's applicability therein. *See* 97 FCC 2d at 962-964.

[5] Transcript citations are given with volume number and date because of pagination errors made by the official reporters.

[6] The proposed programming material contained in the hearing exhibit does not appear to relate to Chase's reciprocal service argument. Nevertheless, should Chase seek to argue

4. In addition, Chase excepts to the ALJ's rejection of its hearing Exhibit 9 which purports to demonstrate its "sensitivity to minority needs."[7] By means of this exhibit, Chase sought to offset the enhancement credit awarded by the ALJ to HHC for its proposal to integrate a 10% minority owner. *See I.D.*, para. 45. The rejected exhibit describes Mr. Chase's past broadcast experience insofar as it involved his management of minority and female employees and his news coverage experience of the specific needs and problems of women and minorities, and Chase's proposal to staff key management positions at the station with women and minority group members. Chase also promises to establish a minority and women's affairs advisory board for the station. Chase further describes specific proposed programming to be oriented to women and minorities. Attached to the rejected Chase exhibit are letters from past female and minority associates of Mr. Chase, which attest to his special sensitivity to women's and minority issues. Nonetheless, the ALJ rejected the exhibit because of his view that such was irrelevant to the established comparative criteria as well as because of the fact that he would, therefore, add no special issue on sensitivity to women and minorities. *See* Tr. 190-191 (Vol. 5, January 1984).

5. In *San Joaquin TV Improvement Corp.*, 96 FCC 2d 594, 601-604 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 617 (1984) (application for Comm'n review pending), the Board observed that the Court of Appeals had held a decade ago that non-minority applicants could attempt to offset a competitor's minority enhancement credit, or claim such credit for itself, by demonstrating a special sensitivity to minority viewpoints, *citing TV 9, Inc.* v. *FCC*, 495 F.2d 941 (D.C. Cir. 1974) (supplemental opinion; *en banc*). *See also Intercontinental Radio, Inc.*, 56 RR 2d 903, 931 n.120 (Rev. Bd. 1984), *review denied*, FCC 85-108, released March 13, 1985 (Comm'n). Our *San Joaquin* decision clarified that a showing of minority

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before the ALJ on remand that its proposed programming is relevant to the comparative or Section 307(b) issues, it must first seek an additional specific programming issue and meet the traditional, stringent test of producing a threshold showing of the particular needs of the service area for its proposed programming and how its proposed programming will meet the specific identified needs of the service area. *See Chapman Radio and Television Co.*, 7 FCC 2d 213, 214-215 (1967) (Comm'n), and *George E. Cameron, Jr. Communications*, 71 FCC 2d 460, 464-466 (1979) (Comm'n), *modified in Comparative Broadcast Hearing Procedures*, 75 FCC 2d 721 (1980) (Comm'n), for discussion of the need for specific programming issues and threshold showings where programming evidence is proffered under the standard comparative issue. In Section 307(b) cases, the Commission made clear in *Cookeville Broadcasting Co.*, 19 RR 897, 899 (1960), that specific programming issues and threshold showings would be required to ensure that hearings would not be delayed and hearing records burdened by programming evidence lacking decisional significance. *See Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 711 (Rev. Bd. 1982).

[7] Chase Exceptions at 20 & n.34.

sensitivity was relevant to the consideration of whether a competing applicant's minority ownership-participation enhancement factor could be offset. *San Joaquin, supra*, 96 FCC 2d at 602. Apart from the §307(b) issue, the applicants are comparatively very close, *see supra* note 3; and the rejected exhibit "appears *prima facie* material to the issue," 96 FCC 2d at 603. We shall therefore add an issue to determine whether Chase is specially sensitive to minority and/or female viewpoints; and, if so, the effect on its comparative qualifications.[8] [9] *See id.*

6. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed February 21 and April 15, 1985 by Harker Heights Communications ARE GRANTED, and the amendments ARE ACCEPTED; and

7. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for adduction of evidence on the following issues and the issuance of a *Supplemental Initial Decision*:

(1) To determine whether Chase Communications Co. will provide reciprocal service to Harker Heights and Killeen and, if so, the effect on the resolution of the Section 307(b) issue; and

(2) To determine whether Chase Communications Co. is specially sensitive to minority and/or female needs and viewpoints and, if so, the effect on its comparative qualifications.

8. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and proof under the issues added herein SHALL BE upon Chase Communications Co.; and

9. IT IS FURTHER ORDERED, That the application of Killeen Communications, Inc. (File No. BPH-820415BH) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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[8] As explained in note 6, *supra*, if Chase believes that programming evidence will be probative and decisionally significant on the sensitivity issue, it must make a further threshold showing and seek a separate programming issue from the ALJ. *San Joaquin*, 96 FCC 2d at 602.

[9] Although the proffered minority sensitivity exhibit here was first produced on the hearing exhibit exchange date, we believe that, inasmuch as a separate issue is warranted on special minority sensitivity claims, such an issue should in the future be requested by the filing of a motion to enlarge issues within 30 days after publication of the hearing designation order in the Federal Register. *See* 47 CFR §1.229(b); *Comparative Broadcast Hearing Procedures, supra* note 6.

FCC 84D-72

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
James P. Chase, III, d/b/a Chase Communications Co. Killeen, Texas	MM Docket No. 83-554 File No. BPH-810827AK
Roy J. Smith, Euna E. Hardaway, F. Beth Zeiss d/b/a Harker Heights Communications Harker Heights, Texas	MM Docket No. 83-556 File No. BPH-820415AK
Killeen Communications, Inc. Killeen, Texas	MM Docket No. 83-559 File No. BPH-820415BH
For Construction Permit for a New FM Station	

Appearances

Robert Lewis Thompson and *Tyrone Brown* on behalf of Chase Communications Co.; *Roy F. Perkins, Jr.* on behalf of Harker Heights Communications; *John E. Fiorini, III* and *Peter Gutmann* on behalf of Killeen Communications; and *Charles Dziedzic* and *Brian Kilbane* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: October 9, 1984; Released: October 12, 1984

Preliminary Statement

1. This proceeding involves the mutually-exclusive applications of James P. Chase, III, d/b/a Chase Communications Co. (Chase); Roy J. Smith, Euna E. Hardaway, F. Beth Zeiss and Julia D. Hardge, d/b/a Harker Heights Communications (HHC); and Killeen Communications, Inc. (KC) for a construction permit to build and operate a new FM broadcast station on Channel 288A (105.5 mHz) at Harker Heights or

Killeen, Texas.[1] The applications were designated for comparative hearing by Hearing Designation Order (HDO) released June 15, 1983, on the following issues:

1. To determine: (a) the areas and populations which would receive aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.
3. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation: Harker Heights Broadcasting.
4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. The dismissal of the application of Harker Heights Broadcasting mooted Issue No. 3, leaving for resolution Issues 1, 2 and 4.

3. Prehearing conferences were held on August 18 and September 21, 1983. Hearing was held on January 3, 4, 5 and 6, 1984. The record was closed by *Memorandum Opinion and Order* released April 5, 1984 (FCC 84M-1669). Proposed Findings of Fact and Conclusions of Law were filed on June 14, 1984. By stipulation the parties waived filing Replies.

Findings of Fact

307(b) Issue

4. *Killeen, Texas.* Killeen is contiguous to Harker Heights (KC Ex. 1, p. 1). It has a council-city manager form of government and 400 employees. It has the largest police department in the area with about 95 full-time employees. The fire department of Killeen has 115 firemen, of which 45 are volunteers and 70 are full-time professionals. The Killeen Water Department is municipally owned (Chase Ex. 6, para. 4; KC Ex. 1, pp. 2-3).

5. Killeen was founded in 1882 by the Santa Fe Railroad (Chase Ex. 6, para. 2). It has exhibited dramatic population growth over the past four decades. In 1941, the population was 1,265. The 1970 population was 35,500. The 1980 Census population was 46,296, a 30.4 percent increase

[1] When the Hearing Designation Order was released on June 15, 1983, there were seven (7) applicants. However, all but the three applicants noted have dismissed their applications either unilaterally or by agreement. *Memorandum Opinion and Order* released April 5, 1984, FCC 84M-1668; *Memorandum Opinion and Order* released April 5, 1984, FCC 84M-1669; *Memorandum Opinion and Order* released August 29, 1983, FCC 83M-2899; *Order* released February 6, 1984, FCC 84M-626.

since 1970. The official estimate for 1983 is a population of 60,800. Killeen is adjacent to one of the world's largest military posts, Fort Hood. Approximately 15,000 soldiers stationed at Fort Hood and their families reside in Killeen (Chase Ex. 6, paras. 2 and 3; KC Ex. 1, p. 1).

6. Services and facilities in Killeen include a community center, amphitheater, public library of approximately 100,000 volume capacity, 3 city parks (all having pavillions and playground facilities), 8 community parks for children, 6 tennis courts, 3 swimming pools, 6 physical fitness centers, 1 bowling alley, 13 movie theaters, 2 youth centers, 2 skating rinks and a 7,200 yard golf course. There are 38 houses of worship representing 16 denominations (Chase Ex. 6, para. 5; KC Ex. 1, p. 3; Vol. VI, Tr. 340-1). It has 82 civic and charitable organizations covering a wide variety of needs and interests. The Killeen Independent School District serves all area students; it provides public elementary, middle, high school and vocational schooling to Killeen, Harker Heights, Nolanville, Fort Hood and the area (Chase Ex. 6, para. 11; KC Ex. 1, p. 2; Vol. VI, Tr. 337).

7. Killeen is serviced by Rio Airways which is the nation's fourth largest commuter airline. It has rail transportation and bus service. Killeen has 6 shopping centers and numerous retail establishments purveying most forms of goods and services (KC Ex. 1, pp. 2-3). Fort Hood has an average monthly expenditure of about $70,000,000, the greater part of which is absorbed by Killeen's economy (KC Ex. 1, p. 1).

8. There are two commonly-owned commercial broadcast stations licensed to Killeen, Texas: KIIZ(AM), 1050 Kilohertz, 250 watts, daytime, and KIXS-FM, 93.3 megahertz, 100 kilowatts effective radiated power, 520 feet height above average terrain. Non-commercial, educational Station KNCT-FM, 50 kilowatts effective radiated power, 1,170 feet height above average terrain, also is licensed to Killeen (HHC Ex. 14; KC Ex. 1, p. 5).

9. *Harker Heights, Texas.* Harker Heights, Texas, is a separately incorporated city located in Bell County in central Texas. It is adjoined on the east and west by the cities of Nolanville and Killeen, respectively. Interstate Highway No. 35, approximately 20 miles to the east, runs north about 35 miles to Waco and on to Dallas-Ft. Worth, and south about 60 miles to Austin, the state capital (HHC Ex. 7, p. 1). Harker Heights has 5.1 square miles within its city limits (HHC Ex. 7, p. 1).

10. Harker Heights is governed by an elected city council and mayor, meeting twice monthly. There is a city manager and administration, with a city hall building. Harker Heights has a Planning Commission and a Fire Commission. Departments of the city government include Fire, Police, Water and Sewage, Recreation, Sanitation and Streets. It has a municipal court. City employees, at the time of hearing, numbered 56. The Fire Department has a fire house, five fire vehicles, an ambulance available at

all hours, and a staff of 6 full-time and 25 volunteer firemen. The Police Department has 8 vehicles and 26 policemen. City services include a public library, opened about a year and half prior to hearing in this proceeding, and a baseball park (HHC Ex. 7, p. 2). Water service is provided by the Bell County Water Control and Improvement District No. 4, serving principally and almost exclusively Harker Heights; the city manager is comptroller of the Water Control and Improvement District (HHC Ex. 1, p. 2).

11. The 1980 U.S. Census population of Harker Heights was 7,345. Harker Heights was founded in December 1960 and its home rule charter was filed in December 1970. The 1970 U.S. Census population of Harker Heights was 4,216 (HHC Ex. 7, p. 1). Water and power connections indicate an annual population growth rate approaching 15 percent. The current population of Harker Heights, based on non-business water and power connections, provided by the city manager, is 10,500, which translates to a growth rate in three years (since the 1980 U.S. Census) of 42.9 percent and gives Harker Heights a projected population in 1990 of 24,000 (HHC Ex. 7, p. 1; Tr. 221-4, 237-8). Growth of the city is evident in other ways. In 1980 the city budget was $1,029,736; in 1983, it was $2,300,000, a 123 percent increase in three years. Building permits issues in Harker Heights in 1980 were for construction of a total cost of $3,154,358. Building permits issued in 1982 were for construction costing $9,725,459 and permits issued to date in 1983 were for construction costing approximately $16,000,000, representing a 410 percent increase in three years (HHC Ex. 7, p. 1). Bank deposits in the Heights Bank, in Harker Heights, increased at an annual rate of 32.55 percent in the period from June 1982 to June 1983, and increased 19 percent in the six months from December 31, 1982, to June 30, 1983, i.e., at an annualized rate of 38 percent (Tr. 236-7, 263-4).

12. Services and facilities in Harker Heights include an elementary school (operated by the Killeen Independent School District, serving Killeen, Harker Heights, Nolanville, etc.) (HHC Ex. 7, p. 2; KC Ex. 1, p. 2; Tr. 323-4, 337-8); the city library; a Harker Heights telephone exchange; U.S. Post Office (a suboffice of the Killeen post office); bank; attorneys, 3; dentists, 2; veterinarians, 2; certified public accountant; architect; real estate agencies, 3; building contractors, 6; barber and beauty shops, 5; pet supply stores, 3 (2 with kennels); sewing services, 2; auto dealers (used), 2; auto repair services, 6; mobile home dealers, 3; hardware store; service stations, 5; pharmacy; department store; supermarkets, 2; convenience stores, 7; foreign market, liquor stores, 9; Goodwill Industries, nurseries and day care facilities, 6, and kindergartens, 3. Five churches are located in Harker Heights. Clubs and leisure and recreational facilities in Harker Heights include restaurants, 5; clubs and lounges, 13; VFW post with club

house; Kiwanis Club of Harker Heights; movie theater with three screens; roller skating rink; the city baseball park, and a tennis and swimming club (HHC Ex. 7, pp. 2-3).

Reception Issue

13. The areas and populations to be served by the applicants are as follows (HHC Ex. 8 p. 2; see also Chase Ex. 1):

Applicant	*Area Sq. Miles*	*Population*
Chase Communications Co.	634.5	126,019
Harker Heights Communications	641	127,302
Killeen Communications, Inc.	593	117,869

The City of Cooperas Cove, with a 1980 U.S. Census population of 19,469, presently has four aural (AM or FM) services nighttime. Two of the applicants would provide a fifth service nighttime to all of Copperas Cove and one of the applicants would provide a fifth service nighttime to part of Cooperas Cove. The populations in Copperas Cove which would be provided a fifth aural service nighttime are as follows (HHC Ex. 9, p. 3; Tr. 94):[2]

Applicant	*Area (%)*	*Population*
Chase Communications Co.	100%	19,469
Harker Heights Communications	100%	19,469
Killeen Communications, Inc.	65%	12,654

The Contingent Comparative Issue

Applicants

14. *Chase Communications Co.* James P. Chase, III, is the 100-percent owner of applicant, Chase Communications Co. (Chase Ex. 4, p. 1). He is proposed as the full-time general manager of the station (Chase Ex. 5, p. 1). Chase was born in Waco, Texas in 1951 and has been a lifelong resident of the Central Texas area (Chase Ex. 5, p. 1). Upon a grant of the application, Chase will establish a residence within the primary service area of the station, in the Killeen metropolitan area (*Id.* at 5).

15. Although he resides in Waco, Texas, sixty miles north of Killeen, Chase is employed by KCEN-TV, a station that serves the Killeen metropolitan area (*Id.* at 6). Largely because of that contact, Chase has been active in Killeen civic affairs for the past three years (*Id.* at 5). He has been active in the Easter Seal Society (*Id.*). He has also been involved in volunteer work for the Bell County branch of the Central Texas Rehabilitation Center (*Id.*).

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[2] The need for a fourth service nighttime in the business and factory areas of Cooperas Cove, concerning which evidence was received, has been eliminated by the Commission's *Report and Order* in BC Docket No. 79-265, released March 23, 1984 (FCC 84-88), which eliminated the previous requirement for a minimum standard broadcast signal of 10 mV/m for service to such areas for cities of the population of Copperas Cove.

16. Chase has substantial broadcast experience in news, sales, and management. In high school, Chase worked weekends as an announcer at KEFC-FM (now KNFO-FM) and KWTX, both Waco, Texas (Chase Ex. 5, p.1). While earning a bachelor of journalism degree from the University of Texas at Austin (awarded in 1973), he was a part-time announcer at KHFI(AM & FM), Austin, Texas (*Id.* at 2). During 1977, Chase was employed as a news reporter for KSIX(AM) and KZTV, Corpus Christi, Texas (*Id.*). In 1978, he worked as a newsman for KRIS-TV, Corpus Christi, Texas, and was elected president that year of the Corpus Christi Press Club. In 1979, Chase worked briefly as a newsman at KMOL-TV, San Antonio, and then moved to Laredo, where he became news director and anchorman at KGNS-TV (*Id.*). As news director at that station, Chase was the management-level official given total responsibility for public ascertainment (*Id.*). In 1981, Chase moved to Dallas where he sold subscription television service and worked part-time as news announcer at KOAX-FM (*Id.* at 3). In October 1981, Chase began work as a news reporter, producer, and host of a morning TV program at KCEN-TV, Temple-Waco, Texas (*Id.*). By supervising sales, production, taping and by doing on-air work, Chase built sales from $25 ads per week to a more-than-$3,000-a-year package of local advertising (*Id.*).

17. Chase has no attributable interest in any broadcast station, newspaper, or other means of mass communication (*Id.* at 8).

18. *Harker Heights Communications.* Harker Heights Communications is a limited partnership in which the general partnership interest is owned as follows (HHC Ex. 1; also Tr. 196-7, 216-9, 242, 244, 271):

Roy J. Smith	2.0%
Euna E. Hardaway	63.5%
F. Beth Zeiss	24.5%
Julia D. Hardge	10.0%
	100.0%

19. None of the Harker Heights Communications general partners nor the limited partner or its principals has any attributable interest in a medium of mass communication (HHC Ex. 1, p. 2; Ex. 2, pp. 1-2; Ex. 3, p. 3; Ex. 4, p. 3).

20. Mrs. Euna E. Hardaway will be full-time manager of the broadcast station at Harker Heights, Texas, proposed by Harker Heights Communications. She will be in overall charge of all aspects of the station operation and business, and spend a minimum of forty hours per week in the active management and conduct of its affairs (HHC Ex. 2; Tr. 209). Hardaway resides in Bell County, outside incorporated areas, but less than four miles from the center of Harker Heights. Her residence since August 1977 have been within the principal-city (3.16 mV/m) coverage contour of the station proposed by Harker Heights Communications (HHC Ex. 2).

21. Mrs. Hardaway was born in Pensacola, Florida, in April 1955, and raised there. She attended Pensacola Junior College for two years, and graduated; she then attended the University of West Florida, Pensacola, for two years, and graduated from it. In August 1977, she moved to Killeen, Texas, where she lived until August 1979, at which time she moved to her present residence (HHC Ex. 2). She passes through Harker Heights daily (HHC Ex. 2; Tr. 207).

22. Mrs. Hardaway has been employed as an elementary teacher by the Killeen Independent School District for a total of 5-½ years, teaching at elementary schools located in Killeen, and is presently in her second year of teaching at Pershing Park Elementary School, Killeen. She was employed by Central Texas College, near Killeen, to teach a course titled, *English As a Second Language*, in the school year 1978-79. She and her husband were the owner-operators of a gift store in Killeen for almost a year in 1980-81. She was employed full-time as the manager and operator of the business. This included supervision of one employee and doing all the purchasing of products for sale in Chicago, Dallas, etc. The business was terminated on the birth of their daughter when she no longer could make the out-of-town trips to do purchasing (Tr. 210-1, 234, 240-1). She and her husband, as convenient, kept the books for the business. (HHC Ex. 2).

23. Mrs. Hardaway participated, as a member of the Greater Killeen Chamber of Commerce's Education Committee, in planning and presenting a barbecue in August 1983 for teachers of the Killeen Independent School District, which operates, among other schools, an elementary school in Harker Heights. In April 1983, she participated as a performer in a play presented at Pershing Park Elementary School, Killeen, sponsored by officers of the Judge Advocate General's Corps at Fort Hood, as an observance of Law Day. She was a Sunday School Teacher at the First Baptist Church, Killeen, for one and half years, commencing in 1977, and is a Sunday School Teacher there now, commencing in November 1983. She is a charter member of the Killeen Junior Service League, formed in November 1983. The Service League supports volunteerism and provides assistance at hospitals, nursing homes, and to any public service effort. Since August 1983, she is a member of the Funtier Kennel Club, Killeen (HHC Ex. 2).

24. Mrs. F. Beth Zeiss will be full-time operations manager of the station proposed by Harker Heights Communications. She will be in charge of station internal operations and, during absences of the general manager, in overall charge of the station. She will have her residence at Harker Heights, Texas, or in the immediately surrounding area (TR. 312-3), and be employed a minimum of forty hours per week in the foregoing. Her responsibilities will include staff scheduling, arranging maintenance

and repairs, production of program schedules and logs, programming policy and decisions in consultation with the general manager and program director, deposits and payments, billing and bookkeeping (HHC Ex. 3).

25. Mrs. Zeiss was born March 1952 at Hillsboro, Texas. From 1958, until January 1972, she lived in Copperas Cove, Texas, a place within the 1 mV/m coverage contour of the station proposed by Harker Heights Communications. Commencing in the summer of 1970, through December 1971, she attended Central Texas College, near Killeen, completing two years of study in that time. From January 1972 through May 1973, she attended Texas Woman's University, Denton, Texas, completing two years of study in that time, graduating with a Bachelor of Science Degree in Library Science. She continued studies at Texas Woman's University for a master's degree from September 1973 to August 1974; subsequently, she completed the few remaining requirements and received the degree of Master of Library Science (HHC Ex. 3).

26. From September 1974 through May 1977 (three school years), Zeiss was employed as a librarian with the El Paso, Texas, public school system. In 1977 she returned to Copperas Cove and in January 1978, moved to Killeen, where she lived until February 1979. In February 1979 to April 1979, she and her husband lived about half a mile south of Harker Heights, Texas, within the principal-city (3.16 mV/m) contour of the station proposed by Harker Heights Communications. From April 1979 to September 1982, they lived at Lomas Rodondo, located in the western part of Bell County and within the 1 mV/m coverage contour of the station proposed by Harker Heights Communications (HHC Ex. 9, p. 4 and Figure 1). From August 1977 to September 1982, Zeiss was employed as the director of the American Technological University section of the Oveta Culp Hobby Memorial Library of Central Texas College and the University, situated between Killeen and Copperas Cove. Her work experience includes total responsibility as a librarian for adherence to budgets (Tr. 334), and billing and receipts for the educational consulting business (*infra*) which she and Dr. Zeiss operate (Tr. 330-2) (HHC Ex. 3).

27. For several years Zeiss participated annually in the fund raising broadcasts by educational Stations KNCT and KNCT-FM, licensed to Central Texas College, of which her husband was general manager; she acted as greeter to visitors, answered telephones and made confirmatory calls and, for the television station, assisted on-camera by showing merchandise available. She was committee woman and volunteer worker for the Copperas Cove Boy Scouts from 1980 until September 1982, acting as adult counselor for boys seeking merit badges and assisted at scouting functions for the Leon Valley District (BSA), which includes the entire area to be served by the station proposed by Harker Heights Communica-

tions. In the period 1966 through 1971, she taught the Wednesday evening bible class for children of parents in attendance at her church in Copperas Cove; she also taught vacation bible school for several summers. She was responsible for escorting the bible class on several occasions to retreats and religious events elsewhere in Texas. She was a member of the Copperas Cove chapter of the American Association of University Women in the period 1978-80; she assisted for two years in presentation of a haunted house for children on Halloween. She was a charter member in 1981 of the Copperas Cove chapter of Delta Kappa Gamma, the international honor society for women educators, which assists with civic projects such as crafts fairs. She was president of the chapter from June 1982 until September 1982, when she and her husband relocated to Pueblo, Colorado. She has assisted in presentation of the "Readers and Writers Roundtable", an annual project of the Central Texas Area Museum at Solado, Texas. The museum serves the area, including all of Bell County (in which Harker Heights is situated). The Roundtable is a gathering of writers and interested persons, with author's works displayed. In the period 1978 to September 1982, she attended and participated in numerous civic events and meetings at Harker Heights, Killeen, Fort Hood (which adjoins Killeen), and Copperas Cove, Texas, including chamber of commerce functions, military functions and functions presented by the American Educational Complex (the all-inclusive name for Central Texas College, near Killeen, and associated activities) (HHC Ex. 3).

28. Mrs. Zeiss and her husband, Dr. Zeiss, moved to Pueblo, Colorado, in September 1982, where they presently reside. This was part of a career move for her husband, who was executive dean at Central Texas College, near Killeen, and presently vice president for instruction at Pueblo Community College. She is employed as an instructor at the college, teaching speech and introduction to reading and literature. They intended, when they moved, and intend now, to stay in Pueblo only two or three years, in anticipation that would be the period of time needed for Commission action on the Harker Heights Communications application and the existence of its proposed station, and then to return to the Killeen area[3] (Tr. 312-3, 324-5, 353, 355, 359-61). Dr. Zeiss has an interest in a Texas corporation engaged in providing contract educational services and they have an educational consulting business which can be conducted anywhere. Dr. Zeiss has an open invitation to return to Central Texas College. They anticipate no difficulty in Dr. Zeiss being gainfully employed when they return to the Killeen area although Mrs. Zeiss is prepared to precede him to participate in operation of Harker Heights

[3] Pueblo Community College was informed that Dr. Zeiss did not intend to stay permanently when he took his position with it (Tr. 349, 360).

Communications' station, should that be necessary (Tr. 325-6, 330-1, 336-8, 349-53, 355-8).

29. Julia D. Hardge will be full-time program director of the station proposed by Harker Heights Communications. She will be in charge of station programming and spend a minimum of forty hours per week in the active management and conduct of its programming. Miss Hardge's responsibilities will include news gathering, news programming and the production and presentation of informational and public issues programming. She lives in Killeen. She is minority group (black) person (HHC Ex. 4).

30. Commencing in 1965, Hardge lived in Killeen a total of about twelve years. She was born in November 1956 at Fort Knox, Kentucky. She lived at Killeen when her father was stationed at Fort Hood and serving in Viet Nam in the period 1965-1974, during which she attended Killeen schools (Tr. 280-1). Her father retired to live at Killeen in 1977; since then, except for a period of two years, she has lived continuously in Killeen. She attended Central Texas College, near Killeen, for three years in 1977-80 (Tr. 277), graduating with honors. Her major course of study was telecommunications; this included such subjects as radio and television program production, broadcast law, broadcast management, writing, sales and technical requirements. In 1980-81, she attended American Technological University, Killeen, affiliated with Central Texas College, graduating with a B.S. degree in Telecommunications Technology (HHC Ex. 4).

31. In the school years of 1978-81, Hardge was a paid broadcast operator, operating the control board at Station KNCT-FM, the educational FM broadcast station licensed to Central Texas College. She was a part-time employee at Station KNCT-FM for two school years and full-time employee during the last year. For one school year or more, she also was a news announcer at KNCT-FM and did public affairs interviews for "Womens' World", a five minute weekly radio program broadcast by KNCT-FM once a week. During the same period she also was a trainee at Station KNCT, the educational television station licensed to Central Texas College. She acted as news announcer on the air for five minutes about three times a week or did interviews of about five minutes in length broadcast in the news programs. She also did occasional interviews for other television programs broadcast by Station KNCT and, for about two years, did weekly interviews of 8 to 12 minutes each for KNCT's "Gazebo" television program, a program of information and discussion for women (HHC Ex. 4).

32. In 1981, Miss Hardge was employed by Television Station KTPX, Odessa, Texas. She was a tape operator in the KTPX control room for about 2 months, until the news department began operation. In October

1981, she became a weekend (Saturday and Sunday) news anchorperson at KTPX, announcing on the air. In September 1982, she was appointed co-anchor of the 6:00 p.m. and 10:00 p.m., half hour news programs, five days a week (HHC Ex. 4). Following a business decision in January 1983 to use the news director as anchorperson of the 6 p.m. news, Miss Hardge continued as co-anchor of the 10:00 p.m. news program (Tr. 286, 301). Her duties at Station KTPX included news coverage and appearances in video reports made on location for broadcast in news programs. During her entire two years at Station KTPX, Odessa, Miss Hardge also was responsible for a thirty minute, bi-weekly public affairs television program dealing with minority community affairs, featuring interviews. She determined the issue to be presented, the guests and the questions, and produced and presented the entire program (Tr. 304-5). She resigned her position with KTPX-TV in November 1983 because of her desire to return to Killeen, and has lived in Killeen since November 26, 1983 (Tr. 279, 301-4). She obtained employment as a news reporter at Station KIXS, Killeen, commencing in January 1984 (Tr. 277).

33. *Killeen Communications, Inc.* Killeen Communications, Inc., is owned as follows (KC Ex. 2):

Name and Residence	*Percentage of Ownership*
Daniel E. Green Harker Heights, TX	40%
Uris Reid Senior Killeen, TX	40%
Charles R. Archer Conroe, TX	20%

34. Uris Reid, Sr., a black male, is Vice-President and 40% shareholder of Killeen Communication (KC Ex. 2). Mr. Reid will be full-time sales and operations manager of the proposed station (KC Ex. 4). Mr. Reid has lived in Killeen continuously for 15 years, though his familiarity with the community and the area goes back to 1951, when he was first assigned to nearby Fort Hood during his Army career. Since 1974 he has been employed at Centroplex Ford, a Ford and Subaru automobile dealership in Killeen. He was originally employed as Public Relations Manager, but has also been General Business Manager since January of 1977. He manages the leasing and rental operation, debt collection and legal coordination; he also acts as assistant to Daniel E. Green, General Manager of the dealership. Mr. Reid served in the United States Army for 21 years, retiring as a First Sergeant. During his career he was awarded two Purple Hearts and the Bronze Star; he also received two commendation awards (*Id.*).

35. Daniel E. Green, a white male, is President and a 40% shareholder of the applicant (KC Ex. 2). He will be business director of the proposed

station on a part-time basis (at least 20 hours per week). He has been a resident of Harker Heights, Texas since 1977. Since November of 1976 he has been Vice-President and General Manager and co-owner of Centroplex Ford, a Ford and Subaru automobile dealership in Killeen. Since 1981 he has been an elected member of the Board of Trustees of the Killeen Independent School District. In the past he has been on the Board of the Greater Killeen Chamber of Commerce and a member of the Killeen Rotary Club. He is a past Chairman of the KNCT-TV auction, a fundraising event to benefit a local non-commercial television station. He is also a past Division Chairman of the Killeen United Way (KC Ex. 3).

36. Charles R. Archer, a white male, is Secretary-Treasurer and a 20% shareholder of the applicant (KC Ex. 2). He will be General Manager of the station on a full-time basis. He currently resides in Conroe, Texas, but will relocate in Killeen if the application is granted (KC Ex. 5). From September of 1974 to February of 1981 he was employed at radio station KIXS-FM in Killeen (*Id.*). He was hired as a salesman; within a year he was made Sales Manager, and within 6 months thereafter became General Manager (Tr. 398). In February of 1981 he left the station due to a change in ownership. After a period of eight months during which he was involved in a business preparing specialized telephone directories, he worked for KIIZ(AM) and KIXS-FM in Killeen as a salesman for about six weeks as a favor to the General Manager (Tr. 384). He became General Manger of radio station KSKS(AM) in Conroe, Texas, in mid October of 1981 (Tr. 385-386). He left that position in October of 1983 to become publisher and a minority owner of the *Conroe Morning News*, a new daily newspaper published in Conroe (KC Ex. 5).[4]

37. Mr. Archer was actively involved in civic affairs in Killeen during his residence there during the period 1969 to 1981. He was on the Boards of the Bell County Board of Health, Chamber of Commerce and United Way Organizations. He is a past President of the Killeen Jaycees and is a life member of that organization. In 1978 and 1979, he was voted an Outstanding Young Man of America in the National Jaycees Contest. In 1980-81 he was voted Outstanding Regional Director by the Texas Jaycees (KC Ex. 5).

Auxiliary Power

38. Both Harker Heights Communications and Killeen Communications propose auxiliary power generators to ensure continued operation of the station in the event of a power outage (HHC Ex. 6; KC Ex. 6).[5]

[4] If the Killeen Communications' application is granted, Mr. Archer will resign his employment, office and directorship in the newspaper and will divest himself of his stock interest (KC Ex. 5).

[5] Chase's attempt to offer evidence respecting an auxiliary generator was rejected as a variance from its application (Tr. 371).

Conclusions of Law

Section 307(b) Issue

39. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission "shall make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same". In resolving a Section 307(b) issue, the Commission looks to both the needs of the communities involved for a transmission service and the needs of the populations to be served for a reception service. *Congaree Broadcasters, Inc.*, 42 FCC 2d 683 (Rev. Bd. 1973); *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640 (Rev. Bd. 1973). In *FM Broadcast Rules*, 40 FCC 2d 662, 664 (1962), the Commission listed three objectives to be applied in making 307(b) FM determinations in the following order of importance: (1) provision of some service to all of the nation, or as much as possible; (2) provision of as many program choices to as many listeners as possible; and (3) service of local origin to as many communities as possible. *See WHW Enterprises, Inc.*, 89 FCC 2d 799 (Rev. Bd. 1982).

40. The first two of these objectives deal with so-called reception aspects of mutually-exclusive proposals, *i.e.*, they deal with whether people to be served by one or more proposals, but not by the other or others, have a need for a first or additional reception service. *See Resort Broadcasting Co., Inc., supra*. In the instant case, the difference in total population to be served by the applicant for Harker Heights (HHC - 126,019 persons) and the applicant for Killeen with the largest population to be served (Chase - 127,302 persons) is insufficient to be of decisional significance. *Resort Broadcasting Co., Inc., supra*. As between HHC and the other Killeen applicant, KC, Inc., HHC would provide a new radio service to 8,150 more persons. Concerning underserved areas and populations, HHC, the applicant for Harker Heights, would provide a fifth aural (AM or FM service) nighttime to the same number of persons and more persons, respectively, as would the two applicants for Killeen, *Chase* and *KC, Inc*. It is concluded that there are no dispositive distinctions among the areas and populations that would be served by the applicants herein.

41. However, under the third objective, *i.e.*, service of local origin to as many communities as possible, it is clear that the proposal for Harker Heights must be preferred over either proposal for Killeen. The findings establish that Harker Heights is an incorporated city; was founded in 1960; its home rule charter was filed in 1970. It is governed by an elected city council and mayor. It has a city manager, a fire department with 6 full-time and 25 volunteer firemen and a police department of 26 policemen. It also has a municipal court, a public library and a baseball park. It has a gamut of businesses, a number of civic organizations, 5

churches, 5 restaurants, 13 clubs and lounges, a movie theater and a number of club and recreation facilities. Its 1980 U.S. Census population was 7,345 and its estimated present population is 10,500. Harker Heights has no local radio (AM or FM) station licensed to it. Killeen has three local radio stations, AM, FM and non-commercial FM, licensed to it. Because Harker Heights is a distinct, separate community, independent of Killeen, and has no local transmission service, whereas Killeen has three local transmission services, HHC is entitled to a decisional preference under Section 307(b) of the Act. In *Pasadena Broadcasting Co.* v. *F.C.C.* 555 F. 2d 1046, 1050-51. (D.C. Cir. 1977), the Court of Appeals stated as follows:

> Local transmission service bestows such important benefits that we have consistently interpreted Section 307(b) virtually to ensure an applicant for first local service preference over one who proposes merely to complement pre-existing local operations. [Footnotes omitted.]

See also *Robert J. Reverman*, 78 FCC 110 (Rev. Bd. 1980).

Contingent Comparative Issue

42. Although findings have been made under the contingent comparative issue, it is unnecessary to arrive at conclusions under this issue because the Section 307(b) issue is dispositive. However, it is to be noted from the following observations that HHC would be the winner herein even though a decisional preference under Section 307(b) were not awarded to it.

Diversification of Media Interests

43. None of the applicants or their respective owners have any attributable media interests.

Integration of Ownership into Station Operation

44. *Chase*. James P. Chase, III, who is the 100 percent owner of the applicant, is proposed as the full-time general manager of the proposed station. His 100% integration is enhanced by his promise to relocate to Killeen upon a grant of the application, his past and present involvement in civic affairs and his substantial broadcast experience.

45. *HHC*. HHC proposes full-time integration of 98% percent of its general partnership interest.[6] This 98% integration is enhanced by female ownership and past local residence. HHC's integration proposal is further enhanced by 10 percent minority ownership of Miss Hardge and for civic involvement of 88% of its ownership. Miss Hardge's integration is enhanced by her broadcast experience. HHC is also entitled to a slight preference for its auxiliary power proposal.

[6] There is no decisional significance to the difference between 98 percent and 100 percent integration. *Vacationland Broadcasting Co., Inc.*, FCC 84R-22, released April 18, 1984, 55 RR 2d 1299, para. 20.

46. *KC, Inc.* KC proposes to integrate 60% of its ownership full-time and 40% part-time (20 hrs. per week). All of its integration is enhanced by local past and future residence. KC also receives credit for the civic participation of 60% of its ownership; a minority status credit for 40% of its ownership, and credit for the past broadcast experience of 20% of its ownership. KC also receives a slight preference for its auxiliary power proposal. However, KC's credits are insufficient to offset the major quantitative integration preference awarded HHC and Chase for their respective full-time integration. It has been ruled that qualitative attributes of participating owners may enhance the value of an integration proposal but may not overcome a clear quantitative difference. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981); *The New Continental Broadcasting Co.*, 88 FCC 2d 830 (Rev. Bd. 1981).[7]

47. As between Chase and HHC, HHC's enhancement credits to its full-time integration together with the preference for auxiliary power are greater than Chase's enhancement credits.

48. Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Harker Heights Communications (File No. BPH-820415AK) for a construction permit to build and operate a new FM broadcast station on Channel 288A at Harker Heights, Texas, IS GRANTED and the applications of Chase Communications Co. (File No. BPH-810827AK) and Killeen Communications, Inc. (File No. BPH-820415BH) ARE DENIED.[8]

FEDERAL COMMUNICATIONS COMMISSION

JOHN M. FRYSIAK, *Administrative Law Judge*

[7] In *The New Continental Broadcasting Co., supra*, the Review Board deemed a 12.5% quantitative difference between two proposals a "clear quantitative difference".

[8] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Advertising, Program-Length Commercials
Children, Advertising
Children, See Programming
Program-Length Commercials, See Advertising
Programming Childrens

Commission denied petition seeking rule that would prohibit profit-sharing arrangements in airing of children's programs. Given the absence of any substantial showing of need for suggested rule and potential harm of eliminating source of funding for children's television, proposal found inadvisable.
—*Children's Programming*

FCC 85-181

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Petition for Rule Making to Prohibit Profit-Sharing Arrangements In the Broadcasting of Children's Programming	RM-4830

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 11, 1985; Released: May 6, 1985

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT.

Introduction

1. On June 25, 1984, Action for Children's Television (ACT) filed a petition for rule making pertaining to profit-sharing arrangements in the broadcast of children's programming. ACT seeks issuance of a rule prohibiting arrangements where, in return for airing a particular program, television stations share in the profits from the sale of products bearing the name of the program, its characters, or program devices. Although ACT's discussion appears to relate to children's programs primarily, the rule proposed would cover all programs.

2. In its petition, ACT alleges that Telepictures Corporation is marketing its syndicated animated children's series, "Thunder Cats", by

offering television stations a chance to participate in profits resulting from the national sale of licensed toys bearing the same name as the program or its characters.[1] It is ACT's position that such profit-sharing arrangements inject commercially biased incentives into the decision-making process of a licensee in the selection of its programs at the expense of the public interest. This runs counter, submits petitioner, to the Commission's marketplace orientation; that station competition for advertising revenue is supposed to generate competition for viewers and for viewer satisfaction. ACT noted that the Commission's 1984 decision states that selection of children's programming should be decided by station licensees and by the audience through its viewer pattern voting.[2]

3. Subsequent to the filing of its petition, ACT filed a Statement of Action for Children's Television In Support of Petition (Petitioner's comments).[3] In its comments, ACT further argues that profit-sharing arrangements will create incentives for broadcasters to intermix commercial messages and program content, although prohibited from doing so by the Commission's 1974 Policy Statement.[4] ACT contends that under such arrangements stations will be induced to select programs that will work effectively as advertisements for the products on which they are based, and that producers will be induced thereby to engage in extensive program/commercial intermixture. Alleging that the proliferation of intermixture of commercial and program content under profit-sharing will be accelerated on a market-wide scale, ACT urges that the Commission undertake a rule making proceeding to consider the likelihood that profit-sharing arrangements will result in violations of the Commission's conceptions of basic fairness in this area.[5]

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[1] Certain features of profit sharing were cited by ACT as standardized in such arrangements. First, a station's profit is based on a formula established by 50% of the station's coverage area, *i.e.*, if a station covers 4% of U.S. TV homes, it will receive 2% of profits derived nationally from the sale of the toy or other product line. Second, the profit-sharing arrangement is designed to continue in perpetuity, *i.e.*, throughout the duration of the profit-sharing agreement, even if the airing of the program is discontinued prior to the end of its scheduled run.

[2] *Children's Report and Order* in Docket 19142, 96 FCC 2d 634, 651 (1984).

[3] By Public Notice (Report No. 1470), issued July 30, 1984, the Commission requested public comment on ACT's petition for rule making. Petitioner's statement was filed on August 28, 1984, and, as such, is being considered comments in this proceeding.

[4] *Children's Television Report and Policy Statement* in Docket No. 19142, 50 FCC 2d 1, 15 (1974).

[5] As appendices to its comments, ACT submitted copies of its filings in *In the Matter of Continental Broadcasting Network, Inc. (WXNE-TV Boston) et. al. and All Other Licensees Similarly Situated Pertaining To Their Broadcast of Program-Length Commercials Directed to Children* ("Program-Length Commercial Docket"), FCC Reference Nos. CJ-8310, C10-238. This complaint, filed by ACT, seeks an administrative order requiring commercial television licensees to compute and log program length

Comments

4. Comments both in support of and in opposition to the petition for rule making were received by the Commission.[6] Those who support ACT's proposal are in agreement with its basic arguments. They submit that profit-sharing arrangements will influence licensees to broadcast programs for financial rather than public interest reasons. Supporters further submit that profit-sharing incentives supposedly would cause such adverse effects as a decline in program quality and the potential disappearance from children's television of programs which focus upon such purely educational objectives as vocabulary building and stimulating an interest in reading.

5. Opponents assert that the petition for rule making fails to demonstrate a nexus between profit-sharing arrangements and any resulting violation of a licensee's duty to broadcast in the public interest. Furthermore, they argue that it has not been established that profit-sharing in and of itself necessarily causes such violations as program-length commercials. The National Association of Broadcasters ("NAB"), in particular, submits that the Commission has ample recourse, through its enforcement procedures, to remedy, on a case by case basis, any injury to the public interest that might arise.[7]

6. Telepictures and NAB defend profit-sharing as an innovative means of financing high-quality children's programming. Telepictures noted that its anticipated total investment in production would be unusually large; $15,000,000 for 65 half hours. They assert that profit-sharing, because of its utility in facilitating the production of programming which might not otherwise be produced, should be seen as a positive force that serves the public interest to advantage. Telepictures comments that the FCC, the Congress and ACT itself have emphasized the critical need for more high quality programming. It is NAB's contention, in fact, that there is a correlation between programming quality, high viewer ratings and the

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commercials directed to children as commercial matter and to comply with the Commission's policies prohibiting program-length commercials.

[6] Supporting comments were filed by: Professor Ben H. Bagdiakian, Dr. William H. Melody, The International Reading Association, the Media Center for Children, the Telecommunications Research and Action Center, the National Association for Better Broadcasting, and the United Church of Christ. Comments in opposition to the petition were received from Telepictures Corporation, the National Association of Broadcasters, and the American Legal Foundation. Also submitted were reply comments by ACT.

[7] The American Legal Foundation, citing the Commission's radio and television deregulation proceedings, argues that self-regulatory market forces are not only more effective in curbing excesses than administrative rules, but that the operation of the marketplace is significantly less expensive and less intrusive than regulatory control. *See Radio Deregulation Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968 (1981), and *Television Deregulation Report and Order*, in MM Docket No. 83-670, 49 Fed. Reg. 33588, published August 23, 1984.

merchandising success of program related products. NAB also states that the Commission itself has admitted that it is "... unrealistic, on the one hand, to expect licensees to improve significantly their program service to children and, on the other hand to withdraw a major source of funding for this task."[8] Opponents further believe that initiating a rule making, as suggested by petitioner, would have a chilling effect on the independent production of children's programming supported on a profit-sharing basis. This in turn would eliminate the benefits of this technique before it had a reasonable chance to develop.[9]

7. In its reply comments, ACT argues that stations will in all likelihood select a program based on a profit-sharing agreement whenever, after comparison, it appears more likely that income derived from the conventionally advertised program would be lower than that derived from a program produced on a profit-sharing basis. Thus, ACT argues that both Telepictures and NAB have failed to rebut this argument, the former by focusing only on the risks incurred by stations choosing to participate in profit-sharing, the latter by speculating only on how the probable correlation between high program quality, high viewer ratings, and merchandise profitability will prevent improper intermixture. ACT submits it is virtually or actually inevitable that stations will select profit-sharing programs whenever their omission to do so will result in direct harm to their financial self-interest. ACT therefore concludes that the public interest, as reflected in the conventional model of broadcasting, will be undermined if profit-sharing arrangements are allowed.

Discussion

8. After considering the arguments advanced by the parties in this proceeding, we are not convinced that issuance of the requested notice of proposed rule making is warranted. We are led to this conclusion by the absence of any reason for believing that the system of program distribution and financing which we are asked to prohibit is, for regulatory purposes, anything other than an alternative to traditional methods of program financing and distribution. "Thunder Cats," moreover, is the only program of which we are aware that involves this

[8] *Children's Television Report and Policy Statement* in Docket No. 19142, *supra* n.4, at 11.

[9] Telepictures Corporation submits that independent producers can produce original first-run syndicated children's programming only through the use of profit-sharing arrangements because alternative production strategies are prohibitively costly for them. In particular, independent producers are unable to spread the financial risk of program production out over a large number of shows and thus have no choice but to consider profit-sharing. Telepictures also states that participating stations have no guarantee of either a direct share of toy revenues or of merchandising profits, the latter being receivable only after Telepictures has recovered its substantial production and distribution costs.

particular type of contractual arrangement. We have no reason, at this point, to believe that it portends a significant trend or that the practice is likely to become widespread enough to merit the initiation of a rule making. Furthermore, in the only children's television case before us in which profit-sharing with a product licensing option has been undertaken, nothing has been presented with respect to the program itself, as opposed to the method by which it was financed, that suggests that it has had adverse consequences for its viewers.

9. Product licensing, in association with television and other forms of entertainment, is widespread. It takes place not only with respect to programming on commercial television but with respect to much of the most popular children's programming on public television and has neither resulted in significant complaints nor otherwise become a cause for regulatory concern. We have not found, nor has it generally been contended, that product licensing per se has deleterious consequences for the public.

10. We further find no empirical evidence or theoretical basis for believing that profit-sharing arrangements will bias the program choices of television stations in an undesirable direction. Both the program production markets and the markets in which stations buy programming are highly competitive. Because of this competitive situation, the cost of programming to stations should reflect the profitability of associated product licensing. It is the market that sets the program price whether that price is set forth in terms of a separate provision for product license profit-sharing or whether product licensing revenues are simply reflected in the price of the program or in the barter arrangement. Contractual profit-sharing arrangements permit stations to assume some of the risk of financing and/or producing a television series and provide them a chance to share in any profits or losses from the program but they do not assure any larger return to the station.

11. We believe the profit-sharing arrangement is an innovative technique to fund children's programming. It is not evil in and of itself. Indeed, if the product involved was an educational book instead of a toy, many would applaud the inventiveness of this form of funding. As stated previously, as we have diversity in the means of delivery of children's television, we should have diversity in the method of financing that programming.[10] Such financing is advantageous to the continuation and growth of children's television offerings which is clearly in the public interest. Given the absence of any substantial showing of need for the suggested rule making and the potential harm caused by eliminating a needed source of funding for children's television, we conclude that ACT's proposal is inadvisable. The petition is also untimely in that "Thunder

[10] *In the Matter of a Children's Advertising Detector Signal* in RM-4545, FCC 85046, at 5.

Cats" is the first children's program financed in this manner. Thus, determining the deleterious effect, if any, of the profit-sharing mode of financing would be most difficult. Therefore, we decline to initiate the requested rule making proceeding.

12. However, we wish to comment on an issue raised in this petition and by the companion complaint item decided today.[11] As ACT points out, *see* para. 2 *supra*, our 1984 *Children's Report and Order* stressed our reliance on independent licensee assessment of the needs and interests of the child audience, taking into account in that assessment the programming available in the marketplace. To accomplish this, a broadcaster must be free to consider a variety of programming sources and formats — from live action to cartoons, from locally produced to network or syndicated fare. These considerations may also properly include, as noted, the innovative financing proposed for "Thundercats" as well as programs that have a product tie-in.

13. We have no reason to believe that product-related considerations will come to dominate or disserve children's programming. But in declining to initiate the requested rulemaking proceeding, we want to place the matters raised by ACT in the context of a licensee's obligation to program to children. Our concern is not with the particular content of any one program; indeed we take note of the increasing solicitude given by the Supreme Court to commercial speech.[12] Rather, we recognize ACT's concerns about structural impact on the variety of children's program sources and formats if too great a weight is placed on the subsidiary concern of product tie-ins, profit sharing, and the like. Were product tie-ins to be the sole factor in program decisions, a licensee's ability to assess the worth of a particular program that did not possess tie-ins might be jeopardized. As the 1984 *Children's Report and Order* stated, "The bedrock obligation of every broadcaster to be responsive to the needs and interests of its community, including the specialized needs of children in that community, remains." Should other interests, such as product tie-ins or profit-sharing, prove to be inconsistent with fulfilling those duties, we might wish to revisit this area.

14. Accordingly, IT IS ORDERED, That the subject petition for rule making (RM-4830) filed by Action for Children's Television IS DENIED.

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[11] Action for Children's Television, mimeo no. 35680, n.7.

[12] See *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 728 (1976); *Bigelow v. Virginia*, 421 U.S., 807 (1975).

15. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

DISSENTING STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Petition for rulemaking to prohibit profit sharing arrangements in the broadcasting of children's programming.

This rulemaking petition and the related complaint proceeding[1] raise troubling questions about overcommercialization in the children's programming arena. Evidence in the complaint proceeding suggests that toy-based shows are increasingly dominating what is being broadcast for young viewers. At least eight toy-based shows were on the air during the 1984 television season[2], and dozens of toy-based shows are apparently in the works for the fall of 1985.[3] This rulemaking petition additionally focuses on an innovation in the way children's programs are financed. This practice of toy companies offering broadcasters a share of the profit the toy company earns from sales in order to induce broadcasters to air programs based on those toys is very troublesome. These events deserve further study.

If these product-based programs were few, or if I believed they were unlikely to take root in the children's arena, I might agree with my colleagues' determination that the FCC's resources can be devoted more productively to other issues. I am concerned, however, that in the wake of recent deregulatory actions[4], the marketing of toys will dominate children's television, squelching other, diverse and educational shows. I am also concerned that there is no effective marketplace deterrent to these commercial practices. Finally, I am disturbed about the predatory impact of the commercial practices at work in toy-based programming on young viewers. Adults would not stand for such crass commercialization, were it directed at them. Why should children, who are more vulnerable to

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[1] *In re Complaints by Action for Children's Television and National Association for Better Broadcasting*, Mass Media Item No. 3, adopted April 11, 1985.

[2] *See ACT Complaint* at 4 (filed Oct. 11, 1983).

[3] *See* Sachar, E., "Cartoon Power: Are Children Being Brainwashed to Buy Toys?," *The Newsday Magazine*, p. 14, February 17, 1985.

[4] *See generally Television Deregulation*, FCC No. 84-243, 98 FCC 2d 25, (released Aug. 21, 1984).

commercials and who are less potent in the marketplace, have to endure it?

In previously cautioning broadcasters against commercial abuse in children's programming, this agency said:

> It is a matter of common understanding that, because of their youth and inexperience, children are far more vulnerable to commercial "pitches" than adults. . . . Since children watch television long before they can read, television provides advertisers access to a younger and more impressionable age group than can be reached through any other medium . . . For these reasons, special safeguards may be required to insure that the advertising privilege is not abused."[5]

While the Commission acknowledged the fundamentally commercial nature of broadcasting, it also recognized the need for sensitive balancing by broadcasters of commercial instincts and the welfare of children.

Because I question whether such sensitivity is being shown by those who choose to emphasize product-oriented shows in their children's television offerings, I believe the Commission should have begun a Notice of Inquiry to consider the implications of the matters raised by Action for Children's Television. The issues ripe for further study include whether the trend toward product-based programming is likely to dampen the already insufficient diversity in children's programming; whether such commercials/programs are deceptive or predatory; and whether a broadcaster whose children's program schedule is composed mainly of toy commercials or shows in which it has a toy-related profit share is meeting its public interest responsibility to children.

I am disappointed that my colleagues fail to appreciate the potential for harm posed by these practices. By turning a blind eye and a deaf ear to the request for study, the majority allow these practices to flourish unchecked. If the petitioners are correct that this increased commercialization is inimical to children, then any administrative response at some later date will be too little, too late.

[5] *Children's Programming and Advertising Policy Statement*, 50 FCC 2d 1, (1974).

CATV Jurisdiction Over, By Local Municipality
Declaratory Ruling

Commission reiterates that cable system, under federal preemption policies are free to add to, delete from, or realign their service offering as long as the "must-carry" signals are retained as part of the basic service offering.
—*Cox Cable New Orleans, Inc.*

FCC 85-106

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:

Cox Cable New Orleans, Inc. versus City of New Orleans, Louisiana, *et al.*, U. S. Dist. Ct, Eastern District of Louisiana, Civil Action Number 84-3743 and 84-4264 (decided October 3, 1984)

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 1985; Released: March 8, 1985

BY THE COMMISSION: COMMISSIONER RIVERA NOT PARTICIPATING.

1. This matter is before the Commission because of our concern that our intention to preempt state and local regulation of the conduct at issue in *Cox Cable New Orleans, Inc. v. City of New Orleans,* Civil Action Number 84-3743 and 84-4264 has been misunderstood by the District Court in its decision of October 3, 1984. The reaffirmation herein of the intent of our earlier order should assist the federal courts in this and any similar cases which may exist elsewhere. The New Orleans proceeding now in federal court is concerned with the extent to which the cable television system serving New Orleans may reduce the number of signals it includes in its basic tier without first obtaining the approval of the City of New Orleans.

2. In a series of decisions dating back over the last decade the Commission adopted policies in the cable television field that had the consequence of preempting the authority of state and local governments from exercising regulatory rate controls over cable television services

other than rates for basic subscriber service. Cox Cable New Orleans, without first obtaining the approval of the City of New Orleans, realigned its service offering and rate structure. This involved removing certain television services from what the City regarded as the cable system's basic service tier and offering these services as part of a separate tier of service. Litigation ensued in the United States District Court for the Eastern District of Louisiana with the system seeking to have the City restricted from interfering with its federal right to retier its service offering and with the City seeking to have a franchise contract dispute that had been removed to federal court, remanded back to the state court.

3. In retiering its service offering and claiming a right to be protected from interference by the City in doing so, the cable system acted in reliance on the Commission's decisions in *Community Cable TV, Inc.*, FCC 83-525, 95 FCC 2d 1204 (Released November 15, 1983) (*Community I*) and *Community Cable TV, Inc.* FCC 84-331, 98 FCC 2d 1180 (Released July 25, 1984) (*Community II*).[1] In the District Court, The Commission participated through counsel to emphasize the Commission's position, as stated in the *Community II* decision, that, under the federal preemption policy cable systems were "free to add, delete, or realign [their] service as long as the basic service contains all the signals mandated by the Commission's rules." *Community II, supra.* p. 9.

4. In an opinion issued on October 3, 1984, the District Court ruled against the cable system and in favor of the City. The District Court in its opinion held that "the FCC did not intend to preempt the local regulation in question" (slip op. at 17) and further noted "The FCC staff counsel seems to argue in its *amicus* brief that the FCC has preempted the area of retiering. This is not in keeping with either the FCC's rulemaking or with its opinions." (note 8)

5. Cox Cable New Orleans has filed a notice of appeal of that decision. Although there are a number of other matters involved in the pending litigation, we believe it may be useful in narrowing the matters at issue if we take this occasion to reaffirm our intent, as expressed in our earlier orders, with respect to the retiering question. The Commission's *Community I* decision addressed the question of whether federal policies in the cable television field had preempted all state and local regulation of the

[1] The Commission's substantive authority and the procedure used to issue rulings of this type have been judicially discussed on a number of occasions. *See Brockhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978); *New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982); *New York State Commission on Cable Television v. FCC*, Case No. 83-2160, 83-2190, 83-2196 (D.C. Cir. decided Nov. 30, 1984); *Capital Cities Cable v. Crisp*, 104 S.Ct. 2694 (1984). An appeal of the *Community I* and *Community II* cases was taken to the U.S. Court of Appeals for the District of Columbia Circuit. That appeal was subsequently dismissed, however, and the time for appeal has now passed. Thus, these decisions are now no longer subject to appeal and are final.

rates charged for channels of cable service that were not part of the basic service package. This proceeding was commenced because the State of Nevada had claimed the authority to regulate the rates for all services other than those for which a per-program or per-channel charge was made. The Commission ruled that the preemption was more inclusive and that local authorities were precluded from controlling the rates for all specialized or auxiliary video services regardless of whether they were advertiser supported, offered as a separate tier of service, or were sold for a per-program or per-channel charge.

6. Petitions for reconsideration of this decision were filed which the Commission denied in its *Community II* decision. In addition, the *Community II* decision addressed a petition for declaratory ruling filed by Cablevision of New Jersey relating to a dispute between it and regulatory authorities in a New Jersey over the meaning of the *Community I* decision. The outcome of the state proceeding in question turned on whether certain services, once part of the system's basic service tier, could be removed and marketed separately. Local regulatory authorities concluded that they could not and directed that the service be restored to its previous configuration. In the enforcement proceeding that followed, the *Community I* decision was cited but the Administrative Law Judge hearing the case declined to accept it as dispositive, stating:

> I cannot conclude, however, that once having represented and intended that the nine channels of programming in issue were part of regular subscriber service and having received a municipal consent and certificate of approval based on that representation of regular subscriber service, that petitioners now have *carte blanche* to remove, at will, every channel but the FCC must-carries from regular subscriber service. [*In re Cablevision of Bayonne*, OAL Dkt. No. CTV 8658-83, April 2, 1984, at page 18]

Cablevision sought an opinion as to whether this view was correct and the Commission, in *Community II*, stated that it was "an erroneous interpretation of Commission policy." (page 8) We reiterated that "proposals or agreements contrary to the federal rules are *ultra vires* and of no force or effect" (page 8) and concluded that the system was "free to add, delete, or realign its service." (page 9)[2]

7. In sum, Cox Cable of New Orleans was entirely correct in relying on the *Community I and II* decisions, including particularly the discussion of the Bayonne cable television system situation in *Community II* as permitting it to retier its service in New Orleans without first having obtained the consent of the City. Not cited in the Court's opinion is the Commission's statement in *Community II* that under federal policies cable systems are free, without local approval first having been obtained,

[2] Moreover, as the Supreme Court noted in *Capital Cities Cable v. Crisp*, 104 S.Ct. 2694, 2704 (1984), with respect to nonbroadcast cable services, the Commission "has explicitly stated that state regulation of these services is completely precluded by federal law." (footnote omitted).

"to add, delete, or realign [their] service." The system operator, under these decisions[3] is free to choose the makeup of the system's basic service, beyond "must-carry" signals.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[3] The Cable Communications Policy Act of 1984, Public Law No. 98-549 was adopted after the issuance of these two decisions. We are not addressing here any changes in policy resulting from its passage since the legislation was specifically not intended to force any rollback of rates or service changes that took place under previous Commission rulings. *See* Congressional Record of October 11, 1984, at page 14286.

Comparative Issue, Contingent
Suburban Community 307(b) Issue

In hearing matter of mutually exclusive CP applications for new FM station in North Las Vegas, Review Board reverses ALJ's grant, which was based on a dispositive § 307(b) preference, and awards it to competing applicant on the standard comparative issue.
—*Debra D. Carrigan*
MM Docket No. 83-858

FCC 85R-26

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Debra D. Carrigan North Las Vegas, Nevada	MM Docket No. 83-858 File No. BPH-810908AH
Constance J. Wodlinger North Las Vegas, Nevada	MM Docket No. 83-859 File No. BPH-820322AW
Silver State Communications, Inc. North Las Vegas, Nevada	MM Docket No. 83-860 File No. BPH-820414AF
MCB Broadcasting of Nevada, Inc. North Las Vegas, Nevada	MM Docket No. 83-862 File No. BPH-820415AD
Las Vegas Electronics, Inc. Paradise, Nevada	MM Docket No. 83-863 File No. BPH-820415AM

New Radio, Inc. North Las Vegas, Nevada	MM Docket No. 83-865 File No. BPH-820415AZ
For Construction Permit	

Appearances

Jerrold Miller on behalf of Debra D. Carrigan; *Michael R. Miller* on behalf of Constance J. Wodlinger; *Robert A. Marmet* and *Harold K. McCombs, Jr.* on behalf of Silver State Communications, Inc; *Harry F. Cole* on behalf of MCB Broadcasting of Nevada, Inc.; *John G. Johnson, Jr.* and *Peggy Kobacker Shiffrin* on behalf of Las Vegas Electronics, Inc.; and *Howard M. Liberman* and *Roger P. Furey* on behalf of New Radio, Inc.

DECISION

Adopted: March 13, 1985; Released: March 20, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL. BOARD MEMBER BLUMENTHAL. BOARD CHAIRMAN MARINO ISSUING SEPARATE STATEMENT.

1. This proceeding involves the mutually exclusive applications of Debra D. Carrigan (Carrigan), Constance J. Wodlinger (Wodlinger), Silver State Communications, Inc. (Silver State), MCB Broadcasting of Nevada, Inc. (MCB), Las Vegas Electronics, Inc. (LVE) and New Radio, Inc. (New Radio) for authority to construct a new FM broadcast station on Channel No. 281C. All of the applicants except LVE propose North Las Vegas, Nevada as their community of license, and LVE has specified the nearby "community" of Paradise. By *Hearing Designation Order*, 48 Fed. Reg. 41512, published September 15, 1983, these applications, along with two others subsequently dismissed, were designated for consolidated hearing to determine, pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), which of the proposals would best provide a fair, efficient and equitable distribution of radio service, and on a contingent comparative issue.

2. In an *Initial Decision* (*I.D.*), FCC 84D-63, released September 4, 1984, Administrative Law Judge (ALJ) Walter C. Miller concluded, under the Section 307(b) issue, that the radio needs of Paradise outweighed those of North Las Vegas, thereby mandating a grant of the application of LVE, the only Paradise applicant. Because the ALJ found that issue dispositive, he declined to set forth detailed conclusions under the

contingent comparative issue, opining in a footnote that the comparative contest was between Carrigan and New Radio, but that Carrigan — a woman — was superior. We have reviewed the *I.D.* in light of the exceptions and reply briefs, the oral argument held January 18, 1985, and our independent examination of the record. We substantially modify the ALJ's findings of fact and conclusions of law, and we reverse his conclusions under the Section 307(b) issue, holding that a grant of Carrigan's application would most obey the Commission's policies and precedent.

Section 307(b) Issue: Background

3. The *I.D.* found that Paradise, Nevada was a sizable (pop. 84,818), separately-identifiable "community" within the Commission's definition,[1] and that it has only one authorized broadcast outlet (KNUU-AM, fulltime[2]). *I.D.*, Fdgs. paras. 11-20. Because North Las Vegas, Nevada was perceived as being a smaller "community" (pop. 42,739), to which two broadcast outlets are currently licensed (KVEG-AM, fulltime; KMJJ-AM fulltime), *id.*, at paras. 5-10, the ALJ concluded that the Paradise applicant — LVE — was entitled, under the *Allentown Broadcasting*[3] principle, to a dispositive preference under 47 U.S.C. §307(b). *I.D.*, Concls. paras. 3-10.

4. All of the frustrated North Las Vegas applicants except, naturally, to the ALJ's quick dispatch of their standard comparative credentials. They argue, sometimes in the alternative, that the award of a dispositive §307(b) preference was in error because: (1) Paradise is not a proper "community," but is instead an integral part of what is commonly known as Las Vegas[4]; or (2) all applicants will serve virtually identical areas and populations that are an integral part of the Las Vegas "urbanized area"

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[1] It is asserted, however, that Paradise is not a "community" within the Commission's definition (47 CFR §73.1120). *See, e.g.*, Carrigan Exceptions at 4-9; New Radio Exceptions at 4-13. Carrigan had challenged LVE's specification of Paradise at the application stage, *see id.*, but the Mass Media Bureau designated the case for hearing without either ruling on the challenge or mentioning the matter in its designation. *Id.* Carrigan renewed its challenge with the ALJ, but lost the point. *I.D.*, Concls. para. 8.

[2] The manner in which KNUU-AM was reassigned to Paradise (from its prior assignment to Las Vegas), and the circumstances under which it obtained nighttime authority as a consequence of the amendment of the FM Assignment Table, are claimed by LVE to have §307(b) significance. Reply Brief of LVE at 2-3. This matter is addressed more fully at paras. 18-19, *infra*.

[3] *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). That case holds that, where a §307(b) choice could be made between mutually exclusive applications for conflicting "communities," the FCC can grant the application proposing to serve the community with the greater need for a new broadcast service, without first determining which applicant was better qualified on a standard comparative basis.

[4] There are currently numerous broadcast stations licensed specifically to Las Vegas, Nevada.

with a Class C FM channel intended for "regional" service.[5] Before we decide upon these exceptions, the following background on §307(b) law may be useful. Those familiar with the terrain may, as they say in Las Vegas, "pick up the action" at paragraph 16, *infra*.

5. Over the years, the Commission has employed a variety of complimentary policies seeking to effectuate the Congressional intent embodied in §307(b). For example, with §307(b) as a Polaris, the Commission has adopted an *FM Table of Assignments*, 49 FCC 2d 1270 (1974), *recon. denied*, 55 FCC 2d 62 (1975), *aff'd mem. Broadcast Good Music Comm.* v. *FCC*, 543 F.2d 416 (1976), which meticulously apportioned the available FM channels to individual communities throughout the nation. It has recently added many more FM channel assignments with the same statutory goal in mind. *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, FCC 84-640, released January 14, 1985. In making a §307(b) choice of communities, the Commission has set forth its priority outline as follows:

(1) First full-time aural service.

(2) Second full-time aural service.

(3) First local service.

(4) Other public interest matters.

[Co-equal weight would be given to priorities (2) and (3)]

FM Channel Policies/Procedures, 90 FCC 2d 88, 90-93 (1982), *recon. denied*, 56 RR 2d 448 (1984).

6. However, recognizing that communities, populations, and their respective communications needs are conscripts on "[t]he ever-whirling wheel Of Change; the which all mortal things doth sway,"[6] the Commission has sought to prevent the bureaucratic ossification of its *advance* channel assignments by permitting some *future* flexibility. Thus, until very recently, applicants for FM channels could apply — pursuant to (former) 47 CFR §73.203(b) — to use an assigned channel *not only* for the specific community listed in the FM Table of Assignments, but — depending on the class of FM channel assigned — to use that channel for another community within 10 or 15 miles of the specifically assigned community.[7] For reasons more fully explained therein, the Commission recently eliminated the "10 and 15 mile rules" (47 CFR §73.203(b)).

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[5] *See, e.g.*, New Radio Exceptions at 13-16.

[6] Spenser, *The Faerie Queen* (bk. VII, canto 6, st. 1). *But cf.* Rosenblatt *Let Me Call You Volvo*, Time, February 18, 1985, at 106 ("Everything changes except that which ought to.")

[7] It was under the "15 mile rule" that LVE applied to use the Class C FM channel at contest in Paradise rather than in North Las Vegas, to which latter the subject channel is specifically assigned.

Suburban Community Policy, 93 FCC 2d 436, 451-453 (1983).[8] Nevertheless, to assure the maintenance of the future flexibility that a fair and reasoned implementation of §307(b) compels, *Suburban Community Policy* explained:

> This, of course, does not mean that applicants are foreclosed from applying for communities 10 or 15 miles from listed communities. Our decision only means that the applicants must petition for a rulemaking in order to add the community to the Table. Henceforth, all 307(b) issues will be concluded in the rulemaking proceeding, which is step one of the licensing process. Step two will be concerned solely with establishing the qualifications of the applicants and, when there are competing applicants, deciding which applicant should prevail.

Id., at 452-453. Moreover, as we have recently noted,[9] even the FM channel assignment priorities set forth in *FM Channel Policies/Procedures, supra*, "were not intended to be applied in rigid and mechanical fashion." *FM Channel Assignments*, 51 RR 2d 25, 29 (1982).[10]

7. The Commission's quest to assure fairness, flexibility and rationality in the practical implementation of §307(b) without, at least, appearing arbitrary has been fraught with difficulties. The timeless problem has come, of course, in striving to (1) assure that every separate "community of appreciable size" has adequate local radio service, *while* (2) ensuring that broadcast applicants have not simply manipulated our flexible rules and processes to garner a wholly artificial benefit by specifying a small community as their city of license, though nonetheless intending to (a) achieve merely a "technical" §307(b) preference in a comparative case, or (b) serve a larger, adjacent community nearby. Thus, in *Miners Broadcasting Service, Inc.* v. *FCC*, 349 F.2d 199 (D.C. Cir. 1965), court reversed the Commission's grant to a Monroeville, Pennsylvania applicant over a mutually exclusive applicant proposing Aliquippa, Pennsylvania. The Commission had found that the latter's 98% coverage of Pittsburgh, Pennsylvania (12 miles southeast) rendered it indistinguishable from the general run of Pittsburgh stations.[11] Another reversal of the Commission

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[8] The policy changes effected in *Suburban Community Policy*, and their implementation, are under challenge *sub nom. Beaufort County Broadcasting Co.* v. *FCC* (hereinafter "*Beaufort I*"), Nos. 84-1384, 84-1432 (D.C. Cir.).

[9] *Santee Cooper Broadcasting Co.*, 57 RR 2d 662, 671 (Rev. Bd. 1984), *recon. denied*, FCC 85R-4, released January 16, 1985 (applications for Comm'n review pending).

[10] Avoidance of rigidity in the application of FM channel assignment priorities was no new principle. In *Santee Cooper*, 57 RR 2d at 671, we quoted as well the much older case of *Plainview Radio*, 24 FCC 405, 421 (1958), for the proposition that the Commission's assignment priorities were "not intended to be a mathematically definite regulation to be applied in every proceeding irrespective of other relevant factors."

[11] The Commission's decision appealed in *Miners Broadcasting* had relied upon the so-called "urbanized area" doctrine of *Huntington Broadcasting Co.*, 5 RR 721 (1949), *reh. denied*, 6 RR 569 (1950), *aff'd* 192 F.2d 33 (D.C. Cir. 1951). The *Miners Broadcasting* critique was, in part, as follows:

on its §307(b) reasoning occurred in *Pasadena Broadcasting Co.* v. *FCC*, 555 F.2d 1046 (D.C. Cir. 1977), where the Commission had awarded a very high-powered AM channel to one of the "Los Angeles-Long Beach metropolitan area" applicants and eliminated a Newport, California applicant proposing much lower power. In *Pasadena* the court pointedly refused to "pass on the propriety of treating [Fullerton, Pasadena and Whittier] as a homogeneous part of Los Angeles . . . ." *Id.*, at 1049, n.19.

8. In its comparative cases, the Board has labored, often and with great vexation, to apply the various §307(b) policies and precedents in a manner that does justice to both the competing "communities" and to the competing applicants, although we must say that the intricate task of deciding just what is a separate "community" for §307(b) purposes, and whether any distinctions between the competing "communities" warrant a dispositive (or lesser) §307(b) preference,[12] has gotten no easier since the days of *Miners Broadcasting* or *Pasadena Broadcasting*. It is a certitude that population growth, population shifts, urban sprawl, megalopolae, and "new" communities (*e.g.*, Reston, Virginia; Columbia, Maryland), have all combined to complicate our burden. Regardless, we have

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> Standards determining the scope of the *Huntington* doctrine in comparative hearings must be established. Its scope is now somewhat obscure.
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> * * * * *
>
> For instance, it is not clear whether facts other than the proposed power, class of station, and frequency are relevant to the characterization of the community. There is some indication that the distance of the suburb from the central city is significant, *Huntington Broadcasting Co., supra*, and it should be relevant if the real issue is whether an applicant would provide an outlet of local self-expression for the suburb or for the entire urban area. Also the size of the suburb, its economic vitality, and its independence from the central city are relevant if the Commission applies the *Huntington* rule to determine whether the applicant would cater to the needs and desires of the population of the central city, rather than the suburb, in an attempt to obtain advertising revenues from businesses in the central city.

349 F.2d at 201-202 n.6. More recently, the court described the post-*Huntington* problem quite crisply:

> Following *Huntington*, however, the exact parameters of this exception to 307(b) were by no means certain, and problems subsequently arose concerning the Commission's somewhat inconsistent characterization of communities as either separate entities, or integral parts of larger regions.

WHW Enterprises, Inc. v. *FCC*, No. 83-2067 (D.C. Cir., filed February 5, 1985), slip op. at 8 (aff'g refusal to apply *Huntington* doctrine to mutually exclusive applicants for Portage and Kalamazoo, Mich.)(remanded on other grounds).

[12] Even where the Commission has accepted that an applied-for *situs* without local aural transmission service is an "identifiable community" (by FCC legal standards), a §307(b) preference does not automatically follow. *Seven Locks Broadcasting Co.*, 37 FCC 82, 84-85 (1964).

endeavored in each §307(b) case to carefully assay the evidence and to apply that §307(b) principle most apposite to the particular case at bar. Though the results of our recent cases have differed insofar as the award, *vel non*, of a §307(b) preference,[13] and we concede that the factual distinctions in particular cases may not be vivid upon cursory perusal, we do believe that deeper inspection will plainly reveal internal consistency, as well as the fair application of the salient standards that have evolved to differentiate between contrasting factual settings. But, to simplify and to synthesize, we hereinbelow outline the three main lines of §307(b) case law, yielding three equally distinct §307(b) "models."

9. *The "Traditional Model."* As we recently opined:

> It is true, as we just expressed in *Ruarch Associates*, FCC 84R-73 [56 RR 2d 1593], released October 18, 1984 (Rev. Bd.), that the sinews of Section 307(b) law hold that '[e]very community of 'appreciable size' ... is *presumed* by the Commission to need at least one radio station for local self-expression.' *Id.*, at para. 2 (citation omitted; emphasis added). And, where 'a transmission service disparity already exists, a different *presumption* applies, namely that the community which has no transmission service has a greater need than the community that already has one (or more).'

Santee Cooper, supra, 57 RR 2d at 668. *See also Pasadena Broadcasting, supra*, 555 F.2d at 1050-1051. Typifying the "traditional model" is *WHW Enterprises, supra*. There the Board found that Portage, Michigan was a separate, self-governing community of appreciable size (pop. 33,590); that it was not economically or culturally interdependent on, or indistinguishable from, Kalamazoo; and that it had established a greater need for a first nighttime radio service than had Kalamazoo for a fourth fulltime service. Or, as the reviewing court summarized[14];

> Portage is a separate and distinct community in need of its first nighttime local outlet and its first competitive daytime station. *Initial Decision*, 89 F.C.C.2d at 881. Fully four pages of the ALJ's decision are devoted to a profile of Portage, outlining its physical dimensions, future development plans, local media, social and cultural activities, consumer spending patterns and economic development. *Id.*, at 825-29.

The vast majority of our comparative cases turn out to be the "traditional model." *See, e.g., Alessandro Broadcasting Co.*, 56 RR 2d 1568 (Rev. Bd.

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[13] *Compare, e.g., WHW Enterprises, Inc.*, 89 FCC 2d 799 (Rev. Bd. 1982)(subsequent history omitted)(dispositive §307(b) preference awarded to Portage, Michigan applicants over Kalamazoo applicant) *with Hispanic Owners, Inc.*, 57 RR 2d 695 (Rev. Bd. 1984)(applications for Comm'n review pending)(no §307(b) preference awarded Rio Rancho, New Mexico applicant over Albuquerque applicants; *Huntington* "urbanized area" doctrine applied). *Compare also Caldwell Broadcasting Corp.*, 57 RR 2d 1039 (Rev. Bd. 1985)(dispositive §307(b) preference awarded Luling, Texas FM applicants over Lockhart applicant) *with Metro Broadcasting, Inc.*, 57 RR 2d 440 (Rev. Bd. 1984)(applications for Comm'n review pending)(no §307(b) preference awarded Winter Park, Florida television applicant over Orlando applicants, *citing St. Louis Telecast, Inc.*, 22 FCC 625 (1957)); *Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982)(subsequent history omitted).

[14] *WHW Enterprises, Inc.* v. *FCC, supra* note 11, slip op. at 10.

1984) (applications for Comm'n review pending); *Public Service Broadcasting of West Jordan, Inc.*, 97 FCC 2d 960 (Rev. Bd. 1984) (review granted in part on other grounds, FCC 85-105, released March 8, 1985); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704 (Rev. Bd. 1982); *Radio Wheeling, Inc.*, 85 FCC 2d 486 (Rev. Bd. 1981); *Bie Broadcasting Co.*, 81 FCC 2d 1 (Rev. Bd. 1980), *review denied*, FCC 81-376, released July 31, 1981 (Comm'n); *Radio Greenbrier, Inc.*, 80 FCC 2d 107 (Rev. Bd. 1980), *review denied*, 80 FCC 2d 140; *Centerville Broadcasting Co.*, 50 FCC 2d 261 (Rev. Bd. 1974), *review denied*, FCC 75-1309, released December 2, 1975 (Comm'n). However, as indicated previously, future §307(b) choices of "community" will be made at the rulemaking stage for FM radio and TV applicants, and not — like the instant or above-cited cases — at the comparative hearing stage. *Suburban Community Policy, supra*, 93 FCC 2d at 452-453.[15]

10. *The "Suburbanite Model."* Exemplified by *Huntington Broadcasting, supra*, no §307(b) preference has been awarded where an applicant (or applicants) have specified a "community" that is determined to be a mere appendage of a much greater urbanized area, and the frequency sought is a high-power class intended for "regional" rather than local coverage needs.[16] In the wake of the court's criticism in *Miners*

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[15] *See also Public Service Broadcasting of West Jordan, Inc., supra*, 97 FCC 2d at 964 n.9.

[16] The foremost example of a broadcast channel intended *expressly* to be a "regional" rather than a local facility is, of course, a television channel. As we observed in *Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982), *review denied*, FCC 83-235, released May 18, 1983 (Comm'n), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984), no §307(b) preference will accrue to a television applicant specifying a smaller community integrally joined to a much larger "urbanized area" because:

> Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues. Beyond these differences, the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) purposes 'should be defined in terms of coverage and not in terms of artificial political boundaries.' *Evening Star Broadcasting Co.*, 27 FCC 2d 316, 321 n.4, 20 RR 2d 1311, 1321 n.3a (1971), *aff'd sub nom. Stone* v. *FCC*, 466 F.2d 316 (D.C. Cir. 1972). Therefore, television stations — unlike FM broadcast stations — are generally considered as providing 'an areawide, rather than a localized service.' *St. Louis Telecast, Inc., supra*, 22 FCC at 713, 12 RR at 1369.

91 FCC 2d at 1137. *See also Washington's Christian Outreach, Inc.*, 56 RR 2d 1539 (Rev. Bd. 1984) (no §307(b) preference given to Arlington, Virginia TV applicant over Washington, D.C. applicants) (applications for Comm'n review pending).

We recently explained that, in distinguishing FM stations from television stations in *Cleveland Television*, we were adverting to the "traditional model"; we noted:

> In *Cleveland* and other TV cases, *supra*, the Board did distinguish television from radio. There we did not focus upon exceptional *Huntington* situations involving

Broadcasting, supra, the analysis used by the Board to differentiate between "traditional model" situations (*e.g., WHW Enterprises*) and "suburbanite model" situations (*e.g., Hispanic Owners*) includes all of the criteria cited by the court in *Miners Broadcasting,* 349 F.2d at 201-202 n.6 (*see supra* note 11), to wit:

- Power and class of station.
- Independence or interdependence of specified "community" to central city of "urbanized area."
- Size and proximity of specified "community" to central city of "urbanized area."
- Signal population coverage and relevant advertising market.

As we indicated above, most §307(b) cases fall easily into the "traditional model"; and as the *WHW Enterprises* court apprehended, the *Huntington Broadcasting* (or "suburbanite model") cases are the "exceptions." *See WHW Enterprises, Inc.* v. *FCC, supra,* slip op. at 8.

11. It is true, as the *WHW Enterprises* court just recounted, that the Commission's primary response to a prior panel's criticism of the application of the *Huntington* doctrine in *Miners Broadcasting* was its *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities,* 2 FCC 2d 190 (1965), and its companion policy regarding FM licensing proceedings in *Berwick Broadcasting Corp.*, 20 FCC 2d 393 (1969). It is likewise true that the Commission wholly abrogated those two specific "response" policies in its 1983 *Suburban Community Policy, supra. See* Brief of FCC in *Beaufort I, supra* note 8, at 8-14. Although we recognize that certain language of the new *Suburban Community Policy* raises "nice" questions, *see, e.g.*, 93 FCC 2d at 451, we do not go as far as an appellant in *Hispanic Owners* who claims broadly that, in the wake of the FCC's 1983 *Suburban Community Policy* change: "The '*Huntington* Policy' is defunct."[17] First, the 1983 *Suburban Community Policy* statement does

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AM or FM radio, but the more traditional *Beaufort County* and *WHW* cases. *But cf. Ruarch Associates,* 56 RR 2d 1593 (Rev. Bd. 1984), and *Santee Cooper Broadcasting Co.*, FCC 84R-87, released December 7, 1984 (traditional 307(b) FM radio cases where no significant differences were found and the cases were decided on the standard comparative issue).

Hispanic Owners, supra, 57 RR 2d at 699 n.1. Our *Hispanic* decision reflected the "fact that Class C FM *and* television stations are supposed to serve wide areas . . . ," *Suburban Community Policy, supra,* 93 FCC 2d at 455 (emphasis added), and we awarded no §307(b) preference to any of the applicants for a Class C FM channel assigned to Albuquerque, N.M. *See First Report and Order,* 40 FCC 662, 677 (1962) (defining Class C FM stations as especially designed to "render wide area coverage" in the western U.S.)

[17] Application For Review filed February 6, 1985 by Rio Rancho Broadcasting, Inc. at 2 (*et seq.*). *Contra,* Reply Brief for Appellant in *Beaufort II, infra,* at 4-10 ("The *Huntington*

not say so; rather, is declared that "[t]he issues raised under the [10 and 15 mile] rule are issues that can be resolved more efficiently and at lower cost to both the applicant and the Commission in a rulemaking proceeding than in a [comparative] hearing." 93 FCC 2d at 452. Hence, in the future, the determination as to whether to favor a suburban community on §307(b) grounds, or whether no genuine §307(b) differences can be found (as in *Huntington*), will be made at rulemaking. Second, in its brief just recently filed in *Beaufort County Broadcasting Co.* v. *FCC* (hereinafter "*Beaufort II*"), No. 84-1265 (D.C. Cir.), the Commission carefully explained the advent and the limited applicability of the *Huntington* doctrine; not once therein does the Commission even suggest that its 1983 *Suburban Community Policy* — under attack by that same appellant in *Beaufort I* — eliminated the *Huntington* doctrine or the critical §307(b) precepts underlying that doctrine.[18]

12. Third, and finally, in the wake of the 1983 *Suburban Community Policy*, the Commission fully recognized that the basic §307(b) questions posed by the *Huntington* doctrine and raised by the court in *Miners Broadcasting* would continue to haunt, even though §307(b) choices of community would, in the future, be made at the rulemaking rather than the hearing stage. *Section 307(b) Preferences within Metropolitan Areas* (MM Dkt. No. 83-403), FCC 83-160, released April 27, 1983, 48 Fed. Reg. 19428. In that docket, the Commission sought to determine how to treat *Huntington*-type situations during the rulemaking stage: whether to enlarge its definition of "community" (*e.g.*, Census Bureau Metropolitan Statistical Areas), whether to consider the Class of station involved, and other related matters. It explained:

> ... under our proposal herein we would make the determination that proposals to serve specific localities within a general metropolitan area should be considered metropolitan area proposals based on criteria to be developed in this proceeding. Pursuant to that finding, there would be no need for a Section 307(b) comparison among proposals for the same metropolitan area. *Rather the assignment would be made to the metropolitan area, and any interested parties could apply for any community within the metropolitan area. Those applicants interested in a smaller community would be free to apply there, but there would be no Section 307(b) preference for a first service to a smaller community in contrast to other proposals in the same metropolitan area. We would not make a Section 307(b) comparison primarily because we believe that the use of a regional channel in a metropolitan area is equally in the public interest regardless of the specific city of license.* Accordingly, the choice of applicants would be based entirely on the standard comparative qualifications developed through the years. The applicant chosen would be licensed to the community specified in the application and would

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Policy Has Never Been Overruled, Rejected or Supplanted By the Commission or the Courts").

[18] *See* Brief of FCC in *Beaufort II* at 13-25. *See also* Brief of FCC in *WHW Enterprises, Inc.* v. *FCC*, *supra*, at 17-18 (explaining *Huntington* doctrine, but arguing inapplicability therein).

> have to comply with all existing rules concerning its community of license. We believe this procedure would result in greater flexibility in providing service where it is needed, and fewer administrative burdens in making Section 307(b) comparisons.

Id., at para. 10 (emphasis added; footnotes omitted). In other words, far from *abandoning* the precepts underlying *Huntington,* the intent of the proposal in Dkt. No. 83-403 is to *codify* those inescapable precepts for use in future §307(b) determinations made in the post-*Suburban Community Policy* environment.[19]

13. Accordingly, while *Huntington*-type determinations will continue to be made at the rulemaking stage in post-*Suburban Community Policy* cases, such §307(b) determinations must yet be made — as in the instant case — in the context of the earlier-designated comparative contests remaining in the "pipeline." This we have done where §307(b) issues have been designated by the Commission, *compare Hispanic Owners, supra, with Beaufort County Broadcasting Co.*, 94 FCC 2d 572 (Rev. Bd. 1983) (*Huntington* doctrine found inapplicable: no "urbanized area" involved; Port Royal and Beaufort, South Carolina found to be separate, independent communities; sizable community without local aural transmission outlet favored), *recon. denied,* FCC 83R-73, released September 29, 1983, *review denied,* FCC 84-284, released June 19, 1984 (Comm'n).[20] We will continue to do so by applying the venerable criteria referenced by the *Miners Broadcasting* court and iterated hereinabove at paragraph 10.

14. *The "Quiet Village Model."* Situated somewhere between the "traditional model" and the "suburbanite model" are the even rarer samples exemplified by our recent decisions in *Ruarch Associates,* 56 RR 2d 1593 (Rev. Bd. 1984) and *Santee Cooper Broadcasting Co.*, 57 RR 2d 662 (Rev. Bd. 1984).[21] Although finding that certain applicants in both cases had established that the exceedingly small communities without aural transmission outlets they had specified in their applications were, at least, "identifiable communities" (as that term is used by the Commission), no measurable §307(b) preferences were due those applicants, in part, because: (1) the signals of any and all of the applicants would cover both competing communities; and (2) the larger competing communities had shown a far greater public interest need for a first *competitive* aural service than the fractionally smaller communities (population under 1000 in both cases) had shown for a first aural transmission service.[22] Hence, in *Ruarch Associates,* we found that the town of Edinburg, Virginia (pop.

[19] No further action has been taken in Dkt. No. 83-403. Until then, case-by-case analysis is necessary. And appropriate. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947).

[20] This §307(b) comparative decision is on appeal in the D.C. Circuit as *Beaufort II, supra.*

[21] Applications for Commission review are pending in both cases, as noted before.

[22] Providing a *competitive* local transmission service is an important public interest consideration. *See generally Babcom, Inc.*, 27 FCC 2d 437, 438-439 (Rev. Bd. 1971), *set aside on other grounds,* 31 FCC 2d 425 (1971); *Caprock Radio, Inc.*, 28 RR 2d 240

752) was entitled to no measurable §307(b) preference over Woodstock, Virginia, a much larger community without a first competitive voice; in *Santee Cooper*, we found that Bluffton, South Carolina (pop. 541) was entitled to no measurable §307(b) preference over neighboring Hilton Head Island, a much larger community without a first competitive "voice." In both of the foregoing cases, the primary signal contours of *all* applicants would have covered both competing communities, and the competing communities were in such close proximity that the location of the respective studios would have made no material difference.[23] These cases were not new law, *see generally Cherokee Broadcasting Co.*, 17 FCC 2d 121 (1969) (Murphy, North Carolina awarded its third local transmission service over Blue Ridge, Georgia with no local transmission service). *Cf. FM Channel Assignments*, 51 RR 2d 25, 29 (1983) ("favoring a second assignment to a large, dynamic community over a first assignment to a very small community is not inconsistent with the Commission's mandate to assign frequencies in a fair and efficient manner").[24]

15. The "quiet village" model is not heavily populated, for reasons that should be obvious. First, even in an attempt to snap up a §307(b) preference, very few broadcasting applicants are willing to specify — with good faith (or straight face) — a community with a population of under 1000; the identification with such small communities is, at the least, a strong marketing negative. And, second, very few comparative applicants would wish — if challenged — to have to prove their *bona fides* as to their purported desire to serve the mini-community when their proposed signal fully covered the larger competing one.

Section 307(b) Issue: "Paradise Lost"

16. Considering the foregoing, the task at bar is to determine whether we should buy the "traditional model" or the "suburbanite model,"[25] by reference as always to the criteria iterated by the court in *Miners Broadcasting* and Commission policy precedent consistent therewith. The

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(1973). The *WHW Enterprises* court recognized the importance of a sizable community's "first *competitive* daytime station." *See id.*, slip. op. at 10 (emphasis added).

[23] It might also be noted that *Ruarch Associates* and *Santee Cooper* are consistent with the courts' vital concerns in *Miners Broadcasting* and *Pasadena Broadcasting, supra*; in both cases the court was distressed that §307(b) had been interpreted in such a way as to *eliminate* a competing applicant. In our two recent "quiet village" cases, no applicant was summarily eliminated on §307(b) grounds; rather, *all* applicants in both cases were weighed on the standard comparative criteria. *See also Hispanic Owners, supra*, at para. 19.

[24] *See also id.*, 51 RR 2d at 29, where the Commission admonished that its FM assignment priorities "were not intended to be applied in rigid and mechanical fashion."

[25] Sensing from Paradise the din of dice, the whirring wheels, and the neon phantasmagoria, we bypass the "quiet village" model without further comment.

exceptors to the *I.D.'s* grant of a dispositive §307(b) to LVE urge that Paradise is indistinguishable from, and/or an integral part of, the greater metropolitan area of Las Vegas. They observe that the FM channel under contention is a Class C intended by the Commission for regional coverage in the western states; that "all applicants in this proceeding, including LVE, propose a transmitter site at the top of Black Mountain, six miles southwest of Henderson, Nevada"[26] and that "North Las Vegas and Paradise are located within five miles of one another within the same Las Vegas Standard Metropolitan Statistical Area."[27] And[28]:

> In addition to the foregoing, the record evidence demonstrates that Paradise is both commercially and culturally interdependent with the City of Las Vegas and the Las Vegas metropolitan area. Paradise is not an incorporated city or a political or governmental subdivision of the State of Nevada or of the County of Clark. The Paradise area is governed by the Clark County Commissioners and does not have its own independent elected officials. All municipal services (schools, police, fire protection, refuse collection, recreational facilities, libraries, etc.) are provided by Clark County. Paradise does not have a separate zip code; addresses for residences and businesses in the area are identified by a Las Vegas zip code. Businesses are licensed by Clark County and not by Paradise. Moreover, the record shows that Paradise does not have its own Chamber of Commerce, and none of the banks within Paradise have adopted 'Paradise' as part of its name. In addition, Paradise does not have a central 'downtown' shopping district, and the hotels and casinos located within the area all identify themselves with 'Las Vegas'. McCarran International Airport, which is physically situated within the unincorporated town of Paradise ... is known as the Las Vegas Airport.

Another party claims[29]:

> The primary employers in Paradise are hotels, casinos and the like whose names are associated *not* with Paradise, but with Las Vegas: The Desert Inn, the Castaways, The Sands, Caesar's Palace, the MGM Grand, the Dunes, the Tropicana. A state university is physically located in Paradise, although its name is the University of Nevada at Las Vegas.

In short, exceptors insist that Paradise "is but a name on a map having no independent existence"[30]; instead it is what we commonly call "Las Vegas."[31]

17. LVE admits most of the foregoing, but counters that Paradise cannot[32]:

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[26] Wodlinger Exceptions at 7.

[27] *Id.*

[28] *Id.*, at 7-8.

[29] MCB Exceptions at 13 (citations omitted).

[30] *Id.*, at 14.

[31] While exceptors challenge the existential reality of Paradise, some have gone further. Thus: "Vegas, a fake city, the capital of Nowhere." *See* Attanasio, *The Rat Pack Is Back*, The Washington Post, January 17, 1985 at B2. But then, The Post's solipsism is well known.

[32] LVE Reply at 8 (citation omitted).

> be considered to be an indistinct part of some greater metropolitan Las Vegas entity, as argued by certain of the North Las Vegas applicants. As acknowledged in New Radio's Exceptions, Paradise is geographically separate and distinct from Las Vegas, being separated from the city of Las Vegas by the town of Winchester.

LVE argues that while Paradise does not necessarily have "established boundaries" and that "the boundaries of Paradise Township are different from the boundaries of the Census Designated Place ('CDP') of Paradise,"[33] its population can be definitively determined. And[34]

> That certain public services are provided to Paradise by Clark County, rather than by Paradise itself, does not render Paradise an indistinct component of some ill-defined Las Vegas metropolis.

Mirabile dictu, LVE declares[35]:

> It is Paradise itself which is in reality the business 'heart' of the Las Vegas area. Paradise is the location of the major gambling, recreation, and entertainment establishments which represent the major economic base for all of Clark County.

18. LVE repeats that Paradise is "a 'community' for licensing purposes under Section 73.1120(a)" of the Commission's rules,[36] and it claims that the Commission has explicitly recognized this fact by its 1980 grant to allow LVE's KNUU-AM to change its "city of license" from Las Vegas to Paradise, thus permitting KNUU-AM to upgrade its status to a full-time station.[37] The Commission's 1980 grant is of more than routine significance because — at the time and in a concerted effort to minimize cumulative nighttime interference in the AM spectrum — the agency's rules strictly provided, *inter alia*, that an application for fulltime operation would simply not be entertained unless[38]:

> . . . the proposed station would provide the community designated in the application with a first or second authorized nighttime aural transmission service, and that no FM channel is available for use in the community . . .

Because, as a *Las Vegas* station, KNUU-AM was clearly ineligible for fulltime authority by virtue of the above rules, LVE unearthed Paradise. Or, as explained at hearing by LVE's witness, the general manager of KNUU-AM[39]:

> I was looking for a way to go 24 hours and I was driving down the strip one day and there's a sign that says, 'You're leaving Las Vegas and entering Paradise Town,' and I thought — I don't know. The bells got ringing. So, I took a picture of it and I sent it

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[33] *Id.*, at 6.

[34] *Id.*, at 8. *See also id.*, at 12-13.

[35] *Id.* (citation omitted). We think that this particular assertion rather proves too much.

[36] *Id.*, at 2.

[37] *Id.*

[38] 47 CFR §73.37(e)(2)(ii)(1980). The Commission has recently relaxed its requirements in this regard. *See* FCC Report No. 18248 (Action in Dkts. MM 85-39 and 18651), released February 15, 1985 (mimeo 2619).

[39] Tr. 328.

> back to my attorney and I said, 'Would you run this over to the Commission and ask them if I filed for Paradise, would it be approved.'

19. Although the Commission's 1980 grant to KNUU-AM was extraordinary, we do not view its licensing action to be conclusive evidence that the Commission has concomitantly found that Paradise is a separate "community" warranting a dispositive preference under §307(b).[40] First, nobody apparently contested the 1980 KNUU-AM "move" to Paradise, and we know not whether — with all due respect — the Commission had all the facts developed in this record before it.[41] And, second, while Carrigan filed an early motion to dismiss LVE's application on the ground that Paradise was not a "community" under Section 73.1120 of the rules, the hearing designation order did not address this basic matter.[42]

20. More importantly, however, even if we *arguendo*, assume that Paradise is a "community" under Section 73.1120, that determination would not be dispositive of the §307(b) *preference* question where the other evidence dictates a different result. For example, while accepting that the Washington, D.C. suburbs of Potomac-Cabin John, Maryland and McLean, Virgina might be "identifiable communities," the Commission awarded no §307(b) preference in *Seven Locks Broadcasting Co.*, 3 RR 2d 177 (1964), and held[43]:

> In view of the proximity of the communities involved, the regional channel at issue, the similar coverage of the proposals, and the already well-served reception areas of each, we conclude that Section 307(b) considerations cannot be determinative in this proceeding . . . . Moreover, because of the fact that both regional proposals would provide substantial coverage of the District of Columbia and of the Washington Urbanized Area the conclusion is inescapable that the proposals constituted predominantly regional services for the Washington Urbanized Area.

See also Massillon Broadcasting Co., Inc., 2 RR 2d 409, 415-416 (1964).[44]

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[40] Even LVE counsel would not go that far: he modestly termed the action "persuasive." Tr. of Oral Arg. at 742.

[41] *See* New Radio Exceptions at 11 n.2.

[42] Carrigan Exceptions at 4-5.

[43] 3 RR 2d at 182.

[44] The Commission recently briefed the Court:

> As explained in *Michigan Broadcasting Co.*, 20 Radio Reg. (P&F) 249 (1960), the relative need of the communities is not determinative where the cities involved, though separate legal entities, are not separate communities within the contemplation of Section 307(b) of the Act, *i.e.*, when they are integral parts of a large metropolitan area dominated by a major city. *Id.* at 251. In such instances, none of the applicants receives a Section 307(b) preference and all of them must be considered under the standard comparative issue. *See Huntington Broadcasting Co.*, 14 F.C.C. 563, 583-84 (1950), *affirmed, Huntington Broadcasting Co.* v. *FCC*, 192 F.2d 33 (D.C. Cir. 1951), where Huntington was a separately incorporated city but was considered to be an integral part of the larger city of Los Angeles because it bordered on Los Angeles and shared certain urban and industrial characteristics of the larger city. *See also Newton Broadcasting Co.*, 38 F.C.C. 2d 865, 878 (1965),

21. In view of all of the foregoing, we must fault the ALJ's findings and conclusions on this issue, holding instead that LVE's Paradise bid entitles it to no more than the "suburbanite model" and application of the *Huntington Broadcasting* doctrine. In fact, it is the classic case because:

- The frequency is a Class C regional channel;
- All instant applicants proposed "communities" within 5 miles of each other inside the Las Vegas Standard Metropolitan Statistical Area[45];
- All instant applicants will use the same transmitter site, serving the same geographic areas and populations;
- Paradise is not a separate, self-governing jurisdiction, providing its own municipal services;
- Paradise is not culturally, politically, or economically independent from Las Vegas[46];

In truth, it may be fairly said that Paradise is more notable — for §307(b) analytical purposes — for what it does *not* have, *e.g.*, a separate post office or a "zip code," any elected officials or employees, a charter or code of ordinances, an office or a budget, a city attorney or a court system, a school system, a police or fire department, or even a newspaper.[47] LVE shall not have a §307(b) preference for merely flying what MCB aptly calls a "flag of convenience."[48]

22. On the other hand, none of the other applicants — all specifying North Las Vegas — are entitled to a §307(b) preference. The ALJ obviously awarded them none, and no exceptions specifically directed to that failure have been filed.[49] While the §307(b) theories vary as amongst the five North Las Vegas applicants,[50] most seem to be well satisfied to

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where two AM proposals for Dedham and Newton, Massachusetts were deemed to constitute predominantly regional services for the Boston Urbanized Area.

Brief for FCC in *WHW Enterprises, Inc.* v. *FCC, supra*, at 17.

[45] We, of course, recognize that this factor alone is not determinative. *Suburban Policy Statement, supra*, 93 FCC 2d at 457.

[46] Indeed, as noted, LVE itself cavils that Paradise is the "heart" of Las Vegas, *see supra* para. 17 (*quoting* LVE Reply Brief at 8).

[47] *See* New Radio Exceptions at 7-8; Carrigan Exceptions at 17-22; MCB Exceptions at 12-16; Silver State Exceptions at 7-8; Wodlinger Exceptions at 7-8.

[48] MCB Exceptions at 12.

[49] Any such claims are, therefore, waived. 47 CFR §1.277(a).

[50] LVE accurately reflects:

The five applicants vary somewhat in their exceptions, however. New Radio, Silver State, and Carrigan apparently take the position that Paradise should not be deemed to be a community for purposes of a comparative Section 307(b) analysis. MCB and Wodlinger appear to concede that Paradise is a community for purposes of analysis under Section 307(b), but they argue that Paradise's needs for a new local aural transmission outlet are not sufficiently superior to the needs of North Las Vegas to entitle Paradise to a dispositive preference over North Las Vegas

erase LVE's improper preference and to move to the standard comparative analysis.[51] So too are we.

Standard Comparative Issue

23. Although, as found above, the ALJ erroneously decided this case by awarding LVE a dispositive §307(b) preference, he nonetheless made discrete findings of fact relative to the standard comparative issue: diversification of control of the mass media; integration of ownership with active station management; enhancement of any such integration with local residence, local civic activities, minority and/or female status, auxiliary power, and other factors germane under the 1965 *Policy Statement on Comparative Broadcast Hearings*, *supra*. The findings of fact being accurate in all decisional respects, we need not dwell further on them.

24. However, the ALJ made no conclusions of law under the standard comparative issue. *I.D.*, Concls. para. 11. He nevertheless offered the benefit of his "observation" on this issue, which abbreviated insights may be found at footnote 23 of the *I.D.*, reprinted in our margin at note.[52] We

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pursuant to Section 307(b).

LVE Reply at 6.

[51] Illustratively, Carrigan speculates:

> The record demonstrates that, to the extent that either community has a greater need for a new service, North Las Vegas must prevail. However, at a very minimum, the two communities of North Las Vegas and Paradise are equal, or so close to equal, that the public interest would be best served by resting the decision on the contingent comparative issue.

Carrigan Exceptions at 18. Or, it is urged that "this proceeding must turn on the contingent comparative issue." Wodlinger Exceptions at 9. Or, "LVE's application was unquestionably entitled to comparative consideration . . . ." Silver State Exceptions at 7 n.7. Or, "at worst, Paradise and North Las Vegas both have an equal claim, under §307(b), to the new station." MCB Exceptions at 16-17. Or, "all of the applicants should have been considered under the contingent standard comparative issue." New Radio Exceptions at 16.

[52] *I.D.*, n.23 reads:

> Although no comparative conclusions are required, the following observation could prove helpful to an appellate analysis. Wodlinger, MCB, and LVE are obvious comparative losers. They have extremely weak comparative cases. Silver State is out of it too, although not quite so obviously as the first three. So the comparative contest boils down to Debra Carrigan and New Radio. Carrigan holds a significant comparative edge with her 100% quantitative integration, strengthened by her local residence and civic participation, enhanced by her female participation as the station's proposed General Manager, and augmented by her auxiliary power proposal. In the case of New Radio, Lamar Marchese and Gale Gilbreath have deluded themselves into believing white males can prevail in a standard comparative setting at this point in time.

are constrained to agree with the ALJ's footnote observations, and find that — unless discredited by the exceptions and underlying record — Carrigan must prevail. *See, e.g., Cannon's Point Broadcasting Co.*, 93 FCC 2d 643 (Rev. Bd. 1983), *recon. denied*, 94 FCC 2d 72, *review denied*, FCC 84-161, released April 13, 1984 (Comm'n) (*ceteris paribus*, 100% "integrated" female ownership preferred), *appeal pending sub nom. James U. Steele* v. *FCC*, No. 84-1176 (D.C. Cir.). Ms. Carrigan, who has lived in the Las Vegas area for some time and who has both broadcast and local civic experience, *I.D.*, Fdgs. paras. 32-35, is the sole owner of her applicant entity, and she proposes to be the station's fulltime general manager. *Id.*

25. Apprehending Carrigan's sexual and other advantages, various exceptors challenge her commitment to manage the station, arguing that her experience is in broadcast sales, and it is to that endeavor that she will devote an inordinate share of her managerial time.[53] We have reviewed the record and the testimony relative to this contention, but find nothing unusual or untoward, even if Ms. Carrigan devotes appreciable time to matters affecting sales. Commercial broadcasters must "survive or succumb" in the marketplace. *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). In the rugged Las Vegas market area in which this nascent station must root for itself a sustaining niche, all other proposed broadcasting activities will be rendered wholly academic unless a satisfactory revenue base is planted. It would be both fiction and folly to suggest that, in the real world beyond our semantics and legalisms, a top imperative of a commercial station general manager is not to see that the electric bill is paid, the payroll met, and the sheriff's attention not otherwise attracted. Ms. Carrigan's broadcast experience will tell her, however, that if the fledgling station's programming performance is subpar, the advertisers will — in Louis B. Mayer's immortal phrase — "stay away in droves." There is no record evidence to suggest, and we will not infer, that Ms. Carrigan is ignorant of this immutable symbiosis. Her promise to integrate fulltime, nowhere challenged *per se*, will be credited.[54]

Conclusion

26. We have found that the ALJ erred critically in awarding LVE a dispositive §307(b) preference for proposing to use this Class C, North Las Vegas-assigned channel at Paradise, Nevada, a "community" totally subsumed within the Las Vegas "urbanized area," if not the city of Las

[53] *See, e.g.*, New Radio Exceptions at 16-18; MCB Exceptions at 29-31; Wodlinger Exceptions at 10.

[54] Even if Ms. Carrigan had proposed only to be the station's "sales manager," 100% integration credit would be equally due. *Policy Statement, supra*, 1 FCC 2d at 395.

Vegas itself. Regardless, we do not disqualify LVE, but measure its individual comparative qualifications along with those of the North Las Vegas applicants, who neither seek nor receive their own §307(b) preference over LVE. In that regard, and even if we lessen Carrigan's enhancement for local civic activities,[55] or grant New Radio its late-filed auxiliary power proposal,[56] neither New Radio (or the less qualified applicants) can, we believe, overcome the Commission's sexual preference policy. *See Horne Industries, Inc.*, 56 RR 2d 665 (1984); *Cannon's Point Broadcasting Co., supra.*[57]

27. ACCORDINGLY, IT IS ORDERED, That the application of Debra D. Carrigan (File No. BPH-810908AH) for authority to construct a new FM broadcast station at North Las Vegas, Nevada IS GRANTED, and the applications of Constance J. Wodlinger (File No. BPH-820322AW), Silver State Communications, Inc. (File No. BPH-820414AF), MCB Broadcasting of Nevada, Inc. (File No. BPH-820415AD), Las Vegas Electronics, Inc. (File No. BPH-820415AM), and New Radio, Inc. (File No. BPH-820415AZ) ARE DENIED; and

28. IT IS FURTHER ORDERED, That the petition for leave to amend application, filed October 26, 1984 by Las Vegas Electronics, Inc. IS GRANTED, and the amendment IS ACCEPTED, and that the request to take official notice, filed January 10, 1985 by Las Vegas Electronics, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

SEPARATE STATEMENT OF BOARD CHAIRMAN MARINO

These additional remarks are directed at the language contained in n. 23 of the Initial Decision, released September 4, 1984, that the New Radio principals should not have "deluded themselves into believing white males can prevail in a standard comparative setting at this point in time." *See also Jerome Thomas Lamprecht*, FCC 84R-93, released December 17,

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[55] New Radio Exceptions at 18-19, claiming that Carrigan's activities began in 1982 — not 1980.

[56] *Id.*, at 19-20. *See Metro Broadcasting, Inc.*, 57 RR 2d 440, 452 & n.10 (Rev. Bd. 1984). The fault here lies with the FCC's new Form 301, which no longer requires the specification or cost of proposed transmitting equipment. The form is grossly deficient in this and other respects (*e.g.*, no "integration" proposal required), causing untold litigation and delays at the hearing stage. Revision is required.

[57] While New Radio does claim 51% female ownership, the Commission's *Horne Industries* decision, *supra*, may have erased any significance in the "control" factor. *See* 56 RR 2d at 667-668. It is strictly a matter of proportionality, *see id.* Thus, we concur with the comparative analysis spelled out in the ultimate paragraph, *post*, of the Board Chairman's separate statement.

1984, n. 10. Such hyperbole has no place in adjudicatory opinions of subordinate Commission employees.

Radio Jonesboro, Inc., 96 FCC 2d 1106, 1111-1112 (Rev. Bd. 1984), and the cases cited therein, establish that Commission policy does not permit the elevation of either minority or female ownership into *per se* preferences. These are only attributes of broadcast applicants which like local residence, civic activities, or broadcast experience are considered enhancement factors if the owners propose to participate for a sufficient amount of time (20 to 40 hours per week) in the management of the proposed station. This participation factor can be defeated by the *primary* factor of diversification of media of mass communications, and possibly even by an unusually good broadcast record demonstrating sensitivity to the needs of minorities or females. *See*, e.g., *San Joaquin Television Improvement Corp.*, 96 FCC 2d 695 (Rev. Bd. 1983).

In comparative cases, relevant factors "are all to be weighed, all at once, all with an eye towards the public interest. Nothing is removed from the scales until the balance is struck." *Central Florida Enterprises, Inc.* v. *FCC*, 683 F. 2d 503, 507 n. 16 (D.C. Cir. 1982); *Johnston Broadcasting Co.* v. *F.C.C.*, 175 F2d 351 (D.C. Cir. 1949). If the Court's admonition is followed, no comparative applicant need be disadvantaged.

Based on the ALJ's findings in this case, only two of the applicants — Carrigan and New Radio — propose 100% fulltime participation of ownership in management.* And, with respect to those two applicants, Carrigan is comparatively superior on four of the qualitative factors: local residence — 100% vs. 51%; civic participation — 100% vs. 51%; female — 100% vs. 51%; and broadcast experience — 100% v. 74.5%. *See New Continental Broadcasting Co.*, 96 FCC 2d 544, 546, 55 RR 2d 413, 415 (Rev. Bd. 1983) (qualitative credit is proportionate to quantitative ownership). Neither applicant was charged with any diversification demerit, and even if both are awarded a minor preference for proposing auxiliary power, *see Metro Broadcasting, Inc.*, 57 RR 2d 440, 452 (Rev. Bd. 1984), Carrigan would be the overall comparatively superior applicant.

* Silver State erroneously claims 100% credit, but one of its principals joined the applicant after the "B" cut-off date when another principal left the applicant, and a second principal only proposes to devote 20 hours per week to the station until his elected term expires in 1987.

FCC 84D-63

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Debra D. Carrigan North Las Vegas, Nevada	MM DOCKET No. 83-858 File No. BPH-810908AH
Constance J. Wodlinger North Las Vegas, Nevada	MM DOCKET No. 83-859 File No. BPH-820322AW
Silver State Communications, Inc. North Las Vegas, Nevada	MM DOCKET No. 83-860 File No. BPH-820414AF
MCB Broadcasting of Nevada, Inc. North Las Vegas, Nevada	MM DOCKET No. 83-862 File No. BPH-820415AD
Las Vegas Electronics, Inc. Paradise, Nevada	MM DOCKET No. 83-863 File No. BPH-820415AM
New Radio, Inc. North Las Vegas, Nevada	MM DOCKET No. 83-865 File No. BPH-820415AZ
For Construction Permit	

Appearances

Jerrold Miller on behalf of Debra D. Carrigan; *Michael R. Miller* on behalf of Constance J. Wodlinger; *Harold K. McCombs* on behalf of Silver State Communications, Inc.; *Harry F. Cole* and *Ann C. Farhat* on behalf of MCB Broadcasting of Nevada, Inc.; *John G. Johnson, Jr., L. Andrew Tollin,* and *Peggy Kobacker Shiffrin* on behalf of Las Vegas Electronics,

Inc.; *Ernest T. Sanchez, Roger Fury,* and *Howard M. Liberman* on behalf of New Radio, Inc.; and *Y. Paulette Laden* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: August 29, 1984: Released: September 4, 1984

Preliminary Statement

1. Six mutually-exclusive FM applicants want to operate on 104.1 MHz, Channel No. 281C.[1] Five of them would operate in North Las Vegas, Nevada: (1) Debra D. Carrigan (Carrigan); (2) Constance J. Wodlinger (Wodlinger); (3) Silver State Communications, Inc. (Silver State) (4) MCB Broadcasting of Nevada, Inc. (MCB); and (5) New Radio, Inc. (New Radio).[2] The sixth applicant, Las Vegas Electronics, Inc., (LVE) wants to operate in Paradise, Nevada.

2. Two of the originally designated issues (not including the ultimate conclusionary issue) remain. They are the 307(b) issue, and the standard comparative issue:

> "...
>
> 2. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service.
>
> 3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest."

3. We firmed the case up for hearing at a prehearing conference on December 8, 1983. The hearings took place on January 31, February 1 and 2, 1984. Further conferences had to be held on May 4, and June 8, 1984. The Presiding Officer closed the record on June 12, 1984 (FCC 84M-2652).

4. All six applicants filed their Proposed Findings of Fact and Conclusions of Law on July 16, 1984, and five of them filed Reply Findings on August 3, 1984. Constance J. Wodlinger filed no Reply Findings.

Findings of Fact

Issue 2 — 47 USC 307(b)

5. *North Las Vegas.* North Las Vegas is located in Clark County, Nevada directly north of the city of Las Vegas. It was incorporated in

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[1] None of the six are entitled to a comparative coverage advantage. See FCC 84M-442, released January 26, 1984.

[2] Any grant to New Radio, Inc. would have to be subject to the condition set out at paragraph 15 of the Hearing Designation Order (HDO). See 48 F.R. 41512 published September 15, 1983.

1946, and covers an area of 34 square miles. The city has a Council/Manager form of government. It has its own police and fire departments and operates its own public school system. Clark County Community College, with some 8,000 students, has one of its campuses located there. North Las Vegas had a 1970 U.S. Census population of 24,477, and a 1980 population of 42,739. So the population growth during that 10-year period can be termed "substantial."

6. The primary employer in North Las Vegas is the hotel and casino industry. The second largest is the City of North Las Vegas itself. In 1980 there were 14,123 housing units in the community. 13,086 of those units were occupied. 7,766 of the occupied units were owner occupied, while 5,320 were renter occupied.

7. North Las Vegas has 20 churches, two major shopping centers, 15 motels, 4 financial institutions, a 168-bed hospital, and two medical clinics. It has the customary business, professional, and service organizations. This includes the North Las Vegas Chamber of Commerce, the North Las Vegas Counselling Center, the Optimists, the Elks, and the Masons. The assessed value of all the real estate in North Las Vegas is about $128.5 million. This represents about 4.25% of the total assessed value of the real estate in Clark County.

8. In 1980 the per capita income in North Las Vegas was $5,458; the median household income was $15,583; and the median family income was $16,561.

9. The North Las Vegas Air Terminal is located in North Las Vegas. Although the terminal doesn't regularly service scheduled commercial aviation, it handles private and chartered flights. The recreational facilities located in North Las Vegas include a central neighborhood center, a satellite center, 12 playgrounds and parks totalling 55 acres, the Cheyenne Sports Complex, a Municipal 9-hole golf course, an 18-hole privately-owned golf course, and a Senior Citizens Center. The North Las Vegas Library is part of the City Hall complex. It has over 69,000 volumes and a 22,000 monthly average circulation.

10. North Las Vegas has a daily newspaper published there, *The Valley Times.* It has a current circulation of about 2,000. Turning to the reception aspects of 307(b) there are a plethora of radio reception services available to North Las Vegas, and none of the 5 North Las Vegas applicants seek a 307(b) reception advantage. See Footnote 1. However, and more importantly, looking at the *transmission* aspects of 307(b), there are two broadcast stations licensed to North Las Vegas: Station KVEG(AM) is authorized to operate on 1410 kHz, unlimited time at 5 kW, using a directional antenna at night; and Station KMJJ(AM) is authorized to operate on 1140 kHz, a 10 kW days, and 2.5 kW nights, using a directional antenna at night. This means that if any one of the five North

Las Vegas applicants is granted, it will be bringing North Las Vegas its third local transmission outlet.

11. *Paradise.* Paradise is located in Clark County, Nevada, immediately south of the unincorporated town of Winchester. Winchester, in turn, lies immediately south of the city limits of Las Vegas. Paradise, an unincorporated town, was created by the Clark County Board of Commissioners in 1950.

12. Although Paradise is unincorporated it has well-defined boundaries. For example, on the northern side of the boundary line between Paradise and Winchester there is a sign saying "you are leaving Winchester and entering Paradise." Within those well-defined boundaries lies a land area of 43.5 square miles.

13. Paradise is primarily governed by the Clark County Board of Commissioners and other County agencies. It is Clark County that provides services to Paradise residents, such as highway maintenance, police and fire protection, courts, water supply, and refuse collection. However, Paradise does have a Citizens Advisory Council or Town Board that assists and advises the County Commissioners in their deliberations. The Clark County School District's administrative headquarters is located in Paradise, and several Clark County high schools, junior high schools, and elementary schools are in Paradise, and are attended by children living there.

14. Paradise had a 1970 U.S. Census population of 24,277, and a 1980 population of 84,818. So the population growth during that ten-year period can be termed "phenomenal."

15. The primary employer in Paradise is the hotel and casino industry. The Desert Inn, The Frontier Hotel, The Castaways Hotel, The Sands, The Flamingo, Caesar's Place, The Barbary Coast, MGM Grand, The Dunes Hotel, and the Tropicana Hotel are among the many hotels, restaurants, casinos, night clubs, and entertainment facilities located in Paradise.

16. There are a substantial number of Federal, State, and County Governmental Agencies in Paradise, along with several business and professional organizations. It also has the customary local chapters of such organizations as the Boy Scouts, the Girl Scouts, the Rotary, Kwanis, and Lion's Club. Paradise is the home of the University of Nevada at Las Vegas (UNLV). Associated with the UNLV are the UNLV Contemporary Dance Theater, the University Musical Society, and the UNLV Museum of Natural History.

17. There were 40,715 housing units in Paradise in 1980. 36,894 of those units were occupied. 16,432 of those occupied units were owner occupied, while 20,462 were renter occupied. 29 churches of various religious denominations, at least 8 banks, at least 7 savings and loan associations, the Desert Springs Hospital and several shopping centers

are located in Paradise. The assessed value of all the real estate in Paradise is about $815 million. This represents almost 27% of the total assessed value of the real estate in Clark County.

18. In 1980 the per capita income in Paradise was $9,795; the median household income was $18,310; and the median family income was $22,221.

19. McCarran International Airport is located in Paradise. The airport is served by eighteen commercial domestic and international air carriers, and by other private and commuter airlines. Sunset Park and four golf courses are available for Paradise residents.

20. There is no newspaper of general circulation published in Paradise. Turning to the *reception* aspects of 307(b) there are a plethora of radio reception services available to Paradise, and Las Vegas Electronics doesn't claim any reception advantage. See Footnote 1 *supra*. However, and more importantly, looking at the transmission aspects of 307(b), only one broadcast station is licensed to Paradise: Station KNUU(AM) is authorized to operate on 970 kHz, unlimited time, at 5 kW days, and 500 watts nights, with separate directional antenna systems for day and night operation. This means that if Las Vegas Electronics is granted it will bring Paradise its second local transmission outlet.

Issue 3 — The Contingent Comparative Issue

21. *Description of the Applicants — Carrigan.* Debra D. Carrigan is prosecuting BPH-810909AH as a sole proprietor. She is the 100 percent owner.

22. *Wodlinger.* Constance Wodlinger is prosecuting BPH-820322AW as a sole proprietor. She is the 100 percent owner.

23. *Silver State Communications, Inc.* Silver State is a Nevada corporation made up of six stockholders. The following chart sets out the ownership details on Silver State's principals:

CHART

Name of Stockholder	Office	Director	Ownership of Percentage
Murry Westgate	President	Yes	16.67%
Richard A. Green	Vice-President	Yes	16.67%
J. Howard Simon, Sr.	Secretary/Treasurer	Yes	16.67%
William W. Brown	None	Yes	16.67%
Lula M. Williams	None	Yes	16.67%
Louis A. Tabat	None	Yes	16.67%

24. *MCB Broadcasting of Nevada, Inc.* MCB is an Ohio corporation made up of four stockholders. The following chart sets out the details on MCB's corporate owners and officials.

CHART

Name	Office	Director	Ownership of Percentage
Mary S. Marsh	President	Yes	45%
William C. Bartels	Vice-President	Yes	22.5%
Connie Y. Bartels	Secretary/Treasurer	Yes	22.5%
Blaine Sullivan	None	No	10%
Christopher C. McCracken	Assistant Secretary	No	None
A.B. Glickman	Assistant Secretary	No	None

25. *Las Vegas Electronics.* LVE is a Nevada corporation that is wholly owned by Bernstein/Rein Advertising, Inc., a Missouri corporation. Bernstein/Rein Advertising in turn is wholly owned by Robert A. Bernstein and Irwin D. Rein. Bernstein is President, Director, and owns 69.9% of the advertising agency, while Rein is the Vice-President, Treasurer, Director, and owns the remaining 30.1% of its stock. The following chart sets out LVE's officers and directors:

CHART

Name	Office	Director
Robert A. Bernstein	Vice-President	Yes
Joseph W. McMurray	President	Yes
Herbert M. Kohn	Secretary	Yes

26. *New Radio, Inc.* New Radio is a Nevada corporation made up of four stockholders. The following chart sets out the details on New Radio's principals:

CHART

Name	Office	Director	Ownership of Percentage
Lamar Marchese	President	Yes	25.5%
Patricia Marchese	Secretary	Yes	25.5%
Gale Gilbreath	Vice-President	Yes	23.5%
Cathie Gilbreath	Treasurer	Yes	25.5%

27. *Diversification of Mass Media.* Neither *Silver State, MCB,* or *New Radio,* nor any of their principals have any interest in any medium of mass communications. *Debra Carrigan* does not hold any attributable ownership interest in any media of mass communications.[3]

28. *Constance Wodlinger* is the President, Treasurer, a Director and a 50% stockholder in Wodlinger Broadcasting Company, licensee of KCLO-AM and KZZC-FM, Leavenworth, Kansas. Her husband, Mark L. Wodlinger, is Chairman of the Board, Secretary, a Director and the other 50% stockholder in Wodlinger Broadcasting Company. Ms. Wodlinger is also vice-president of Musico, Ltd., a Nevada corporation, holds an SCA lease in Kansas City, which subleases the subcarrier to the Physician's Radio Network. In addition the FCC has recently granted Ms. Wodlinger a CP for a new low-power television station in Houston, Texas.

29. *LVE* is the licensee of AM broadcast station KNUU, Paradise, Nevada (see para. 20 *supra.*) Bernstein/Rein (see para. 25 *supra.*) also owns 100% of the stock of Reno Electronics, Inc., licensee of KBET, Reno, Nevada. Both LVE and Reno Electronics, Inc. have promised to divest themselves of their interests in Station KNUU(AM) and KBET(AM) if LVE is granted the CP in this proceeding. To this end, LVE has presented testimony regarding its ability to divest of its other existing holdings so it will not hold up service to the public of the proposed station. See LVE Ex. 5; Tr. 366, 437-462, 601-602.

30. Bernstein/Rein Advertising serves as a professional consultant to various television and radio stations throughout the country in the areas of advertising, marketing, station promotions, and programming. In that capacity it places advertising with stations in Las Vegas. Even if LVE is successful in this proceeding, Bernstein/Rein will continue to operate the advertising agency.

31. Robert Bernstein owns 51% of Frisco Electronics, a Colorado general partnership. Frisco Electronics has an FM application pending for Frisco, Colorado. Irwin Rein owns 1/10 of 1% of the voting stock of Communications Fund, Inc. Communications Fund, Inc., in turn, owns 100% of Vanguard Broadcasting Corporation, licensee of KADI-FM, St. Louis, Missouri. Neither Bernstein's ownership of the Frisco, Colorado application, nor Rein's minute interest in Communications Funds, Inc. are cognizable.

32. *Integration of Ownership With Management. Debra Carrigan.* Carrigan claims 100% quantitative integration. She intends to be the proposed station's full-time General Manager. In that capacity, she will

[3] Carrigan is President, Chairman of the Board and the largest stockholder of Mr. Beepers, Inc., a one-way paging system in Las Vegas. If she's granted the FM CP in this case, she will resign as President and Chairman of the Board of Mr. Beepers and devote no more than 5 hours per week to that company.

supervise the station's employees, and be responsible for developing the station's programming, advertising and sales. Carrigan has lived in Las Vegas continuously since 1971 and resides within the service area of her proposed station.

33. Debra Carrigan was born in Tucson Arizona on June 14, 1941. After graduating from high school, she worked for Union Oil as a trainee for about a year. From there she went to work for Friden and attended their programming school. She worked as a programmer in Los Angeles for six years. From 1969-1971 she was the Assistant to the President of J.F. Sanson Investment. She is presently President, Chairman of the Board, and largest stockholder (47%) of Mr. Beepers, Inc. - a one-way paging system in Las Vegas. If her application is granted she will resign as President and Chairman of the Board, and devote no more than 5 hours a week to Mr. Beepers.

34. Carrigan's broadcast experience dates back to 1973 when she became a sales person for KBMI (now KVEG) in Henderson, Nevada. From 1975 to 1982, she was the Sales Manager at KXTZ. Carrigan claims enhancement as a female Caucasian.

35. Carrigan has been civically active within the proposed service area. She has been active in the Salvation Army in the Las Vegas area since 1980, on the Board of the American Cancer Society since 1978, and in the We Care Foundation since 1980. She has been a member of the Las Vegas Chamber of Commerce since 1979, and the North Las Vegas Chamber since 1980.

36. *Constance Wodlinger.* Wodlinger does not intend to be integrated full-time into the management and operation of the proposed station. While she would initially devote full-time to getting the station started, she would then reduce that involvement to 20 hours per week. She doesn't plan to move to Las Vegas, but she'll physically try to be in the Las Vegas area about 2 days per week. She would obtain a condominium or an apartment. She will hire a full-time station manager.

37. Wodlinger's claimed integration is further weakened by her integration pledge in the *South Florida Broadcasting Company, Inc.* proceeding, BC Docket Nos. 82-731 to 82-742. There she proposes to be integrated on a full-time basis into the management of her Miramar, Florida operation.[4] [5]

38. Constance Wodlinger was born in Kansas City, Missouri on October 14, 1951. She presently resides in Mission Hills, Kansas (80% of the time) and Naples, Florida (the other 20%). After graduating from high

[4] It is not known what effect the recent Houston television grant (see para. 28 *supra.*) has on her *Miramar* and *North Las Vegas* integration pledges.

[5] Based on paras. 36-37 *supra.*, Wodlinger cannot be credited even with part-time quantitative integration.

school in 1969, she was the news editor for three newspapers. She was responsible for all reporting, writing, editing, and photography. In 1970, she became the news and copy editor of the *Colorado Springs Sun*, a daily newspaper. From 1971-1972, Mrs. Wodlinger served as editor of corporate public relations for ISC Industries, Inc. in Kansas City, Kansas.

39. Wodlinger started her broadcasting career in 1972 as vice-president and General Manager of KBEQ-FM, Kansas City, Missouri. She supervised all the personnel, and was responsible for the day-to-day management and station programming. Her employment at KBEQ-FM terminated in 1977 when the station was sold.

40. Since 1981 Mrs. Wodlinger has been President of Wodlinger Broadcasting Company (WBC), a Florida Corporation. WBC is the licensee of KCLO-AM, and KZZC-FM, Leavenworth, Kansas. She is the Sales Manager at those two stations. She claims female enhancement.

41. *Silver State Communications, Inc.* Silver State claims 100% quantitative integration. It intends to integrate all six of its shareholders into the proposed station's day-to-day operation.[6]

42. First, Silver State would fully integrate its President, Director, and 16.67% stockholder, Murray Westgate, into its daily operation. Westgate will work at least 40 hours a week as the proposed station's General Manager. In that capacity, he will oversee all phases of the station's operation, and will supervise all employees. Westgate will share responsibility with Lula Williams for implementing and administering the station's EEO program. He currently resides in Las Vegas, Clark County, Nevada, within Silver State's proposed 3.16 mV/m contour. He has lived in Clark County, Nevada, for the past 15 years.

43. Murray Westgate, a white male, was born in September 5, 1928 in Canada. He is a United States citizen. He has over 31 years of broadcast experience at radio and TV stations in the United States and Canada. He has worked in the areas of News, investigative news reporting, advertising, marketing, and public relations. In addition, he has taken broadcast and communications related courses at Midwestern Broadcast College and the University of Nevada at Las Vegas.

44. Westgate has been active in numerous civic activities within Silver State's proposed service area over the years. For example, he has been a member of the Las Vegas Ad Club, the Las Vegas Press Club, and the Las Vegas Urban League; he was the Public Affairs and Newsletter Editor for the Panasonic-Las Vegas Golf Tournament; he has helped raise funds

[6] When it exchanged its prehearing integration, on September 23, 1983, Silver State represented that it would integrate Patricia M. Jarman, a 16⅔% stockholder as General Manager for Operations. Silver State later amended to substitute Lula Williams for Patricia Jarman. See FCC 83M-4352, released November 25, 1983.

for stroke victims for the Stroke Club of Las Vegas; and he is a member of both the Screen Actors Guild and the Society of Professional Journalists.

45. Next, Silver State will fully integrate its Vice-President, Director, and 16.67% stockholder, Richard A. Green, into its daily operation. Green will serve full-time as Sales Manager. In that capacity he will oversee the sale of and schedule commercial time on the station. Green currently resides in Las Vegas, Clark County, Nevada, within Silver State's proposed 3.16 mV/m contour. He has lived in Clark County for ten years.

46. Richard Green, a white male, was born on August 2, 1933, in Detroit, Michigan. He took radio and television courses at Wayne State University in Detroit.

47. From 1964 to 1968, Green worked as an account executive with WWJ-AM/FM/TV, Detroit, Michigan. He was employed by Kaiser Broadcasting in sales positions from 1968 to 1972. He has been an account executive with WKBD-TV, Detroit, and KBHK-TV, San Francisco. He was also Sales Manager of KBSC-TV, in Los Angeles, where he managed the sales staff in addition to selling time. In 1983 Green was an account executive with KLAS-TV, Las Vegas, Nevada. Since August of 1983, he has been a senior account executive with the *Las Vegas Sun* newspaper. During the ten years he has resided in the Las Vegas area he apparently has not been involved in any civic or community activities.

48. Silver State also will fully integrate its Secretary/Treasurer, Director, and 16.67% stockholder, J. Howard Simon, Sr., into its daily operation. Simon will work full-time as the station's Business Manager. In that capacity he will oversee the business affairs of the station. He will handle all the contracts; payroll; and accounts receivable, and payable. He will supervise office personnel and accounting employees.[7] Simon currently resides in Las Vegas, Clark County, Nevada, within Silver State's proposed 3.16 mV/m contour. He has lived in Clark County for 25 years.

49. J. Howard Simon, a white male, was born on May 15, 1924, in Chicago, Illinois. As a businessman, he has been very active in civic activities within Silver State's proposed service area. For 20 years he has served as Board Member of the Luncheon Optimist Club of Las Vegas. He has been both President, Club Secretary, and has been Chairman of the Luncheon every year since its inception in 1965. He served on the Nevada Pest Control Association for 16 years, and was its President for 9 years; he spent 7 years on the board of the Southern Nevada Museum and Cultural Center; he has been active in P.T.A. activities and Boy Scouts; and he spent several years on the board of Operation Bridge - a youth counseling/drug rehabilitation program. Mr. Simon has no prior broadcast experience.

[7] Simon has no broadcast accounting experience or training and would rely on a CPA to set up the station's books.

50. Next, Silver claims that it will fully integrate its Director, and 16.67% stockholder, William W. Brown, into its daily operation. Brown will purportedly work full-time as the station's Director of Community Relations. In that capacity he will oversee the contact between the station and the community and will reflect that contact in the station's programming.

51. However, the record reflects that Brown's position is not a management position. He would be the one actually making the contacts and doing the work; he would work alone; he doesn't know if the station's resources would be available to him; and he will not be paid for his work.[8] (Tr. 386-392). Thus, no quantitative integration credit will be credited for Brown's position.

52. William Brown, a Black male, was born on March 23, 1916 in Forest, Mississippi. Brown currently resides in Las Vegas, Clark County, Nevada — within Silver State's proposed 3.16 mV/m contour. He has lived in Clark County since 1977.

53. Brown has no education beyond the 7th grade; he has been inside a radio station only once, a number of years ago; and he has no prior broadcast experience. He has been civically active within Silver State's proposed service area since 1977. He has been active in the Urban League, the Greater Las Vegas Better Business Bureau, the NAACP, and a local Homeowners Association.

54. Next, Silver State claims it will fully integrate a Director, and 16.67% stockholder, Lula Williams, into its daily operation. Mrs. Williams will purportedly serve as the General Manager for Operations.[9] In that capacity, she will oversee the station's programming and share responsibility with Westgate for the EEO program. She currently resides in Las Vegas, Clark County, Nevada, within Silver State's proposed 3.16 mV/m contour. She has resided in Clark County for 24 years.

55. Mrs. Williams was born on March 4, 1943, at Morton, Mississippi. She has only a limited amount of work experience and no broadcast experience. She has been civically active in the NAACP, NPMA, Beta-Eta-Theta, and in her church where she is the Assistant Director of the Youth Department. She is also active in the PTA and related school activities. In addition she is a member of the Nevada State Public Works Board. She claims Black female enhancement.

56. Finally, Silver State claims that it will fully integrate a Director, and 16.67% stockholder, Louis Tabat, into its daily operation. Tabat will purportedly be the station's Public Relations Director. However, the record indicates that Tabat will not be acting in a management capacity.

[8] Brown will receive a percentage of the station's profits as part owner (Tr. 391-392).

[9] This is the position formerly assigned to Patricia Jarman before she resigned from the Corporation. See Footnote 6 *supra.*; and Tr. 132, 137-151, 492, 509-510, and 517-520.

He will have no staff. He intends to *personally* contact business people, industrial people, organizations, and church groups to see what they need, and see if the station can help them.[10] Primarily he intends to collect information on upcoming community functions, and then have it broadcast over the air.

57. Even assuming that Tabat held a management position, there is a real question whether he would be *fully* integrated into that position. When Silver State filed its integration statement in this case Tabat committed himself to only 20 hours a week. As of October 28, 1983, his commitment was still 20 hours a week (Tr. 555-558). It wasn't until January 20, 1984, when Silver State exchanged its direct case, that Louis Tabat claimed full-time integration. Accordingly, Tabat's quantitative integration claim is rejected.

58. Louis Tabat, a white male, was born on April 28, 1923 in Pulaski, Wisconsin. He currently resides in North Las Vegas, Clark County, Nevada. He has lived there for 30 years.

59. Tabat has multiple occupations. He is retired from the United States Air Force; he has been elected and presently is the Constable of North Las Vegas; and he is a U.S. Olympics as well as a World Boxing Official. Tabat has been civically active within Silver State's proposed service area. He is a member of the North Las Vegas Chamber of Commerce's Board of Directors, Vice-President of the North Las Vegas Girls Club, and National President of the Constables Association. He is a member of the Board of Directors of the World Boxing Officials organization and the Chairman of the U.S. Junior Olympics of Nevada. He is a former director of the North Las Vegas Lions Club.

60. *MCB Broadcasting of Nevada, Inc.* MCB Broadcasting makes no substantial quantitative integration claim. Mary S. Marsh is the President, Director, and 45% shareholder of MCB. She resides in Youngstown, Ohio. She has been employed with the Valley Drug Company since 1928. She is the full-time President of that Company and oversee the management of the Company's wholesale drug distributorship.

61. Marsh would devote 5% of her time weekly; i.e., about 2 hours each week to matters relating to MCB's proposed operation.

62. William C. Bartels is Vice-President, Director, and a 22.5% stockholder in MCB. Born on June 20, 1939 in Huntington, West Virginia, Bartels presently lives in Canfield, Ohio. Bartels received his B.S. degree from Geneva College in Beaver Falls, Pennsylvania, in 1960. He has been employed by the Valley Drug Company in Youngstown, Ohio, since 1965. He is currently Vice-President of Valley Drug, and with Mary S. Marsh, oversees the management of the Company's wholesale drug distributorship.

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[10] Tabat estimates he will make 80-90% of such contacts.

63. Bartels would devote 5% of his time weekly; i.e., about 2 hours each week to matters relating to MCB's proposed operation.

64. *Las Vegas Electronics, Inc.* In essence LVE appears to be claiming 50% quantitative integration. It asserts that both of its owners, Robert A. Bernstein (69.9%) and Irwin D. Rein (30.1%) will each devote 20 hours per week to the supervision of station operations.[11] To this end they say they will share a part-time residence in Clark County, Nevada.[12]

65. Robert A. Bernstein, the President, Director, and 69.9% owner of Bernstein/Rein Advertising, Inc., will devote his 20 hours per week "on the average" to supervising sales, operating budgets, financial management, and local community and civic affairs. He will make executive level decisions, and supervise station employees and consultants. The station's General Manager will report to Bernstein and to his partner, Irwin Rein. Bernstein lays no claim to any past civic or community activities within the proposed service area.

66. Robert Bernstein, a Caucasian male, was born in 1938. He presently resides in Kansas City, Missouri. Bernstein attended the University of Oklahoma, in Norman, Oklahoma from 1956 to 1960, majoring in radio and television journalism. During that time period he worked at the University's student-operated radio station KUVY(AM) in sales and programming.

67. In 1960, Bernstein became a full-time television program producer for Ray-Eye Productions, a television program production company. From 1962-1964, he was the full-time radio and television program producer for the Potts-Woodbury Advertising Agency in Kansas City, Missouri.

68. In 1964, Bernstein and others founded Bernstein/Rein Advertising Inc., in Kansas City, Missouri. About 70% of the Agency's business involves radio and television advertising.

69. Irwin Rein, Vice-President/Treasurer, Director, and 30.1% owner of Bernstein/Rein Advertising, Inc. will devote his 20 hours per week "on the average" to supervising the proposed station's programming and station promotions. He will make executive-level decisions and supervise station employees and consultants.[13]

70. Irwin Rein, a Caucasian male, was born on December 9, 1937. He presently resides in Oakland Park, Kansas. He graduated from the

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[11] LVE's 50% quantitative integration claim will not be credited. Neither Bernstein nor Rein will be integrated into the day-to-day operations of the station. Instead they each intend to devote their 20 hours per week "on the average." This is inconsistent with day-to-day management. LVE Ex. 3, pp. 4-5; Tr. 357, 373, 581-582, and 596-600.

[12] Bernstein and Rein have owned station KNUU, Paradise, Nevada since 1971. Yet they've never seen fit to establish a residence in Clark County before. In fact, Bernstein visits KNUU less than two weeks per year.

[13] Rein admits that part of the supervision he proposes to provide to the station will not be provided by him, but by the Bernstein/Rein Advertising Staff in Kansas City (Tr. 599).

University of Kansas in 1960 with a major in radio and television. In 1959-1960 he worked as a part-time sportscaster for KLWN(AM), Lawrence, Kansas.

71. In 1960 Rein was employed in the advertising and sales department of KUDL(AM), Kansas City, Kansas. Between 1961 and 1964, he worked for advertising agencies in Kansas City, Missouri. In 1964 Rein co-founded the Bernstein/Rein Advertising Inc. since then has been actively involved in its radio and television advertising business. He has also provided professional programming consultation and advice to Station KWKI(FM), Kansas City, Missouri.

72. *New Radio, Inc.* New Radio claims 100% quantitative integration. It intends to integrate all four of its shareholders into the proposed station's day-to-day operations.[14]

73. First, New Radio will fully integrate its President, Director, and 25.5% stockholder, Lamar Marchese, into its daily operation. Mr. Marchese will work at least 40 hours per week as General Manager. In that capacity he will supervise the station's overall operation.

74. Lamar Marchese, a 40-year old white male, currently resides in Las Vegas, Nevada — within the proposed station's service area. He owns his own home and has resided there since 1972.

75. Mr. Marchese obtained a college degree from the University of South Florida. He first became employed in broadcasting between 1967 and 1969 when he received a graduate assistantship at the University of Florida's College of Journalism and Communications. He worked there as operations manager, and was responsible for developing a nightly four-hour student-produced program segment of WRUF-FM, Gainesville. He also supervised the student staff, programming, script writing, and the publishing of a monthly program guide.

76. Marchese spent the summer of 1968 as a Voice of America intern. There he produced a number of radio documentaries and features for shortwave broadcast. He completed his Master of Arts course work in 1969, and took a position as media specialist at the Appalachian Adult Education Center at Morehead State University, Morehead, Kentucky. He received his Master degree in communications in 1972.

77. That same year (1972) Marchese moved to Las Vegas and became the Program Coordinator for the Clark County Library District. While employed at the library, he helped found noncommercial, educational

[14] New Radio has entered into an agreement with the law firm of Arter and Haden which represents New Radio in this proceeding. Under the agreement the law firm will receive 100% of a new class of non-voting stock for the legal services rendered and to be rendered. Arter and Haden will thus be entitled to 25 percent of New Radio's profits, and the non-voting stock represents a 25% equity interest in the corporate assets. Arter and Haden are to be passive investors and will have no say over the management of the proposed station.

broadcast station KNPR(FM), Las Vegas. He was involved in drafting applications submitted to the FCC; he helped obtain financing; he helped draw up equipment bids and purchases; he helped select and obtain the transmitter location; he helped design, plan, construct, and equip the facility; and he was involved in hiring staff, writing personnel policies, and in scheduling programs.

78. Marchese was a founding member of KNPR(FM)'s Board of Directors. He later became its vice-chairman, then chairman and in January, 1979, he became the station's first (and thus far only) General Manager. There he oversees all station departments, develops and administers the annual budget, supervises the fundraising and public relations, and acts as a liasion for KNPR's Board of Directors with the community. If New Radio's application is granted Marchese will terminate his association with KNPR.

79. Since he arrived in Las Vegas, Mr. Marchese has been civically active. He has served on the board of the Allied Arts Council of Southern Nevada. In 1974, he founded and chaired the Nevada Library Media cooperative. Since 1979, he has been a member of both the Preservation Association of Clark County, and the Southern Nevada Historical Society.

80. Mr. Marchese is presently a member of the Greater Las Vegas Advertising Federation, the Nevada Broadcasters Association, the Las Vegas and North Las Vegas Chambers of Commerce, and the Las Vegas Chapter of the International Association of Business Communicators.

81. Secondly, New Radio will fully integrate its Secretary, Director, and 25.5% stockholder, Patricia Marchese, into its daily operation. Mrs. Marchese will work at least 40 hours per week as Business Manager. In that capacity, she'll be responsible for all financial matters. This will include budgeting, managing the finances, billing, and administering station personnel policies.

82. Patricia Marchese, a white female and wife of Lamar Marchese, currently resides in Las Vegas, Nevada — within the station's proposed service area. She has resided there since 1972.

83. Following her graduation from college in 1964, Patricia Marchese was employed as a traffic manager for WALT-AM, Tampa, Florida. There she produced advertising. In 1971, she signed a contract with Kentucky Educational Television as an arts/humanities consultant. There she researched and wrote material for a television documentary series.

84. From 1973 to 1979, Mrs. Marchese was the Administrator of Cultural and Community Affairs for the City of Las Vegas. During that time period she also did consulting work for local organizations involving business and the arts, and in 1980 she authored a research study on that subject. Since 1981, Mrs. Marchese has been employed by Clark County, Nevada. She presently serves as coordinator of Town Services in the

County Manager's Office. Before that she was a senior budget analyst and partly responsible for preparing and implementing the County's budget. In addition, during the 1983 Nevada state legislative session, she served as one of two Clark County lobbyists. She was also a founding board member of the Nevada Public Radio Corporation, licensee of KNPR, (see findings 77-78), and has worked for the station.

85. Patricia Marchese is involved in cognizable civic activities. She is the immediate past president of the Nevada Alliance for the Arts; she currently serves on the Board of Directors of Allied Arts Council; and she is a member of the Children's Museum Subcommittee. She is a member of the Nevada Municipal Finance Officers Association of Clark County, and the American Society of Public Administrators. She also belongs to the Junior League of Las Vegas, The Preservation Association of Clark County, and The Valley Hospital Auxiliary. She claims enhancement as a white female.

86. Third, New Radio will fully integrate its Vice-President, Director, and 23.5% stockholder, Gale Gilbreath, into its daily operations. Mr. Gilbreath will work at least 40 hours per week as the Director of Facilities and Engineering. In that capacity he will oversee all management aspects of the new station's facilities and engineering, and he will supervise the appropriate staff.

87. Gale Gilbreath, a white male, lived in Las Vegas from October, 1980 to October, 1983, but currently resides in San Antonio, Texas. He, and his wife, Cathie, will move to North Las Vegas if New Radio's application is granted.[15] Before 1980 The Gilbreaths lived in Columbus, Ohio.

88. Gilbreath attended Ohio State University from 1961 to 1963. During that period he was a part-time board operator at the University station, WOSU-AM/FM. From 1963 to 1964, he attended Wayne State University in Detroit, Michigan. During that period he was a part-time electrician. In 1965 Gilbreath went back to Columbus where he served as Assistant Chief Engineer for the WOSU-AM/FM recording studio. From 1967 to 1969, he also acted as the Chief Engineer since the regular Chief Engineer was sick.

89. In 1969 Gilbreath became the Manager of Technical Services for the Ohio State University telecommunications department (WOSU-AM/FM/TV) in Columbus, Ohio. He held that position until 1972 when he received his Bachelor of Science Degree in Communications and Broadcasting from Ohio State University.

90. Gilbreath has taken non-degree course work at Ohio State in computer science, mathematics and engineering, and at Wayne State in

[15] The Gilbreaths are purchasing a home in San Antonio although they still own their home in Las Vegas.

electrical engineering and physics. He has also received special training from the British Broadcasting Corporation in London, England, and from the International Telecommunications Union in Brussels, Belgium, and Geneva, Switzerland. In 1970 he attended the Brigham Young University Audio Seminar.

91. From 1972 to 1983, Gilbreath owned and was President of G.A. Gilbreath Associates, Inc., a broadcast consulting firm. There he designed and constructed facilities around the country. The firm is now inactive. Since November 1, 1983, Gilbreath has been employed full-time as the Director of Engineering for C&W Wireless, Inc., San Antonio, Texas. C&W is the licensee of KSAQ(FM), San Antonio. Gilbreath would resign from that position if New Radio is granted.

92. Finally, New Radio will fully integrate its Treasurer, Director, and 25.5% stockholder, Cathie Gilbreath, into its day-to-day operations. Mrs. Gilbreath will work at least 40 hours per week as Sales Manager. In that capacity she will supervise the Sales Department.

93. Cathie Gilbreath, a white female and wife of Gale Gilbreath, currently resides in San Antonio, Texas. See Finding 86 *supra.* She attended Kent State University in Ashtabula, Ohio, from 1972 to 1974, majoring in theater. However, she received her Bachelor of Science degree in education from Ohio State University in Columbus in 1976. In 1982 she began work toward a Masters degree in physical education at the University of Nevada, Las Vegas. Her major interest has been in dance and choregraphy. She has performed as a dancer; she has taught dance to children; and she choreographed dance productions. Mrs. Gilbreath has little, if any, cognizable broadcast experience.[16]

94. New Radio intends to make and implement its policy decisions through a Management Committee. The Management Committee will be made up of its four stockholders (see Findings 72-93 *supra.*), and will meet at least once a week. Decisions will be made by developing a general consensus of Management Committee Members.[17]

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[16] After analyzing Cathie Gilbreath's background and testimony, and after observing her demeanor, the Presiding Officer suspects that, as far as New Radio's application is concerned, she is going along for the ride; i.e., she isn't that enthusiastic about New Radio's proposal, but she is willing to participate and try to give New Radio's integration proposal more female enhancement.

[17] New Radio claims that it is controlled by females. This is only *partially* correct. While it is true that Patricia Marchese (25.5%) and Cathie Gilbreath (25.5%) own a controlling interest in New Radio, so do Lamar Marchese (25.5%) and Patricia Marchese, or Lamar Marchese and Cathie Gilbreath. Having analyzed New Radio's exhibits and observed all four shareholders testify, the Presiding Officer is convinced that the key mover in New Radio is Lamar Marchese. This is primarily his project. He is the dominant force. It is his experience and background that will make or break New Radio if it is granted. But like Jerome Lamprecht in *Middletown, Maryland*, FCC 84D-42, released June 14, 1984, at para. 12, Marchese is a white male.

95. *Auxiliary Power*. Carrigan, Silver State, MCB, and LVE propose standby power capability to insure continued service during power failures and other emergencies. Wodlinger and New Radio do not.

Conclusions of Law

1. Six mutually-exclusive FM applicants seek to operate on 104.1 MHz, Channel No. 281C: (1) Debra Carrigan; (2) Constance J. Wodlinger; (3) Silver State Communications, Inc. (4) MCB Broadcasting of Nevada, Inc.; (5) New Radio, Inc.; and (6) Las Vegas Electronics, Inc. The first five applicants want to operate in North Las Vegas, Nevada while the sixth (LVE) wants to operate in Paradise, Nevada.

2. A hearing was held. The parties adduced evidence on two factual issues: A 47 USC 307(b) issue and a *contingent* comparative issue.

The 47 USC 307(b) Issue

3. The 307(b) issue must be decided first. For it is only if 307(b) is not determinative that we will turn to the contingent standard comparative issue. See *F.C.C.* v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955); and *Robert J. Reverman et. al.*, 78 FCC 2d 1110 (R. Bd. 1980); review denied FCC 80-739 released December 11, 1980.[18]

4. Under 47 USC 307(b) the Commission must distribute licenses among communities so as to provide a fair, efficient, and equitable distribution of radio service. And where mutually-exclusive applicants, as here, propose to serve different communities, it becomes a question of community need without regard to the comparative qualifications of the applicants. See *F.C.C.* v. *Allentown Broadcasting Company, supra.*, and *Beaufort County Broadcasting Company*, 54 RR 2d 923 (R. Bd. 1983).

5. Turning first to the "efficiency" aspects of 307(b); i.e., "reception service", the parties have stipulated that neither side is entitled to a comparative coverage advantage.[19] See Footnote 1 *supra*.

6. We move then to the "fair and equitable" facets of 307(b); i.e., the transmission service aspects. Here LVE's Paradise proposal clearly stands out. Any of the five North Las Vegas applicants would bring a third transmission outlet to North Las Vegas (1980 population - 42,739). On the other hand, LVE would bring a second transmission service to Paradise (1980 population - 84,818).

7. Paradise is not only the larger city as far as population is concerned, it is larger in almost every demographic statistic: Paradise is

[18] Note however that comparative findings have been made. See Findings 21-95 *supra*. It is only comparative conclusions that aren't required. See *WFPG, Inc.*, 33 FCC 673 (1962) at para. 13; *Alkima Broadcasting Co.*, 30 FCC 932, 21 RR 732 (1961) at Footnote 2; and *Sayger Broadcasting Co.*, 32 FCC 496, 22 RR 1059 (1962) at Footnote 7.

[19] See *Wilmer E. Huffman et. al.*, 32 FCC 1 (1962) and compare paras. 9-10 with para. 11.

larger in area than North Las Vegas (43.5 square miles to 34 square miles); it has more housing units (40,715 to 14,123); and the assessed value of its real estate is higher ($815 million to $128.5). Moreover, although both communities are growing, Paradise is growing more rapidly.

8. The North Las Vegas applicants continue to press the shop-worn argument that LVE has failed to show that Paradise is a "community" for 307(b) purposes. This argument is rejected for any one of several reasons. In the first place LVE isn't required to make such a showing. No 47 CFR 73.1120 issue has been requested and none has been added to this case. See 47 CFR 73.1120;[20] *South Florida Broadcasting Company, Inc.*, 47 F.R. 50751 published November 9, 1982; and *Carson Valley Broadcasters, Inc.*, FCC 83M-1419 released May 2, 1983.

9. Secondly, the North Las Vegas applicants raised the argument previously in this proceeding and had it rejected. See FCC 83M-3976, released November 2, 1983. Thirdly, the Commission has already recognized Paradise as a community for broadcast licensing purposes. And finally, based on the record evidence there is no doubt that, under Commission precedent, Paradise is a community deserving of a station assignment. See *Seven Locks Broadcasting Co. et. al.*, 37 FCC 82 (1964) at 84, Footnote 1.

10. Based on the foregoing it is concluded that Paradise has a greater need for its second transmission outlet of self-expression than North Las Vegas does for its third such outlet. See *Easton Publishing Co.*, 8 RR 31 (1953); and *Babcom, Inc.*, 21 RR 2d 6 (R. Bd. 1971).[21] This greater need is decisionally significant under 47 USC 307(b).[22]

Ultimate Issue

11. We needn't make conclusions on the *contingent* comparative issue.[23] The contingency never came to fruition. The 307(b) evidence

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[20] At one time this was known as a 47 CFR 73.30(a) issue. See *Risner Broadcasting, Inc. et. al.*, 13 FCC 2d 781 (1968) at Issue 1; and 20 FCC 2d 790 (1969)

[21] For similar holdings see *Stephenville Broadcasting Co.*, 22 FCC 998, 15 RR 132 (1957); *Wayne M. Nelson*, 26 FCC 539, 17 RR 356 (1959); and *Mercer Broadcasting Co.*, 22 FCC 1009, 13 RR 891 (1957).

[22] The Presiding Officer is aware that there is an outstanding interlocutory pleading he must rule on; i.e., Debra Carrigan's Petition to Enlarge Issues filed back on August 3, 1984. But Debra Carrigan keeps getting extensions of time that have the effect of delaying the disposition of the case. See FCC 84M-3642 released August 21, 1984; and FCC 84M-3249 released July 24, 1984. So the Presiding Officer has decided to go ahead and issue this Initial Decision and rule on the pending interlocutory after Carrigan files her forthcoming Reply.

[23] Although no comparative conclusions are required, the following observation could prove helpful to an appellate analysis. Wodlinger, MCB, and LVE are obvious comparative losers. They have extremely weak comparative cases. Silver State is out of it too, although not quite so obviously as the first three. So the comparative contest boils down to Debra Carrigan and New Radio. Carrigan holds an significant comparative edge

establishes that Paradise, Nevada has a greater need for a second local transmission outlet than North Las Vegas does for its third such outlet. Consequently, a fair, efficient, and equitable distribution of radio facilities under 47 USC 307(b) mandates a grant of Las Vegas Electronics, Inc.'s application.

SO unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, Las Vegas Electronics, Inc.'s application (BPH-820415AM) for Paradise, Nevada, IS GRANTED; and Debra D. Carrigan's application (BPH-810909AH), Constance J. Wodlinger's application (BPH-820322AW), Silver State Communications, Inc.'s application (BPH-820414AF), MCB Broadcasting of Nevada, Inc.'s application (BPH-820415AD) and New Radio, Inc.'s application (BPH-820415AZ) ARE DENIED.[24]

HOWEVER, Program Test Authority WILL NOT be authorized Las Vegas Electronics, Inc. until the Permittee and Reno Electronics, Inc. have shown that they have divested of all interests in, and severed all connections with Stations KNUU, Las Vegas, and KBET, Reno.[25] See 48 F.R. 41512 published September 15, 1983, at para. 14.

FEDERAL COMMUNICATIONS COMMISSION

WALTER C. MILLER, *Administrative Law Judge*

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with her 100% quantitative integration, strengthened by her local residence and civic participation, enhanced by her female participation as the station's proposed General Manager, and augmented by her auxiliary power proposal. In the case of New Radio, Lamar Marchese, and Gale Gilbreath have deluded themselves into believing white makes can prevail in a standard comparative setting at this point in time.

[24] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

[25] In the Presiding Officer's opinion this problem is more knotty than the 307(b) issue on which this case was decided. Bernstein and Rein have pledged to sell two profitable AM operations in order to gamble on an FM proposal. Once can only hope they will keep that promise, although the Presiding Officer has taken steps to insure they would. See Finding 29 *supra*. In addition, Bernstein and Rein should indeed feel fortunate that the Commission has abandoned the "trafficking" concept.

Environmental Impact

Application's for review denied. Where site of a television tower is a national landmark and is also eligible for inclusion in the National Register of Historic Places, 50-foot increase in height is minor environmental action because the tower would be only 140 feet above ground level and because it would be in an antenna farm. —*First Century B/cing, Inc.*

FCC 85-114

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
First Century Broadcasting, Inc. (KFCB(TV)) Concord, California	File No. BMPCT-820512KF
For Modification of Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 1985; Released: March 19, 1985

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the January 12, 1984, action of the Chief, Mass Media Bureau, affirming his previous grant of the above-captioned application of First Century Broadcasting, Inc. (FCBI) for a modification of its construction permit for Station KFCB(TV), Channel 42, Concord, California; (b) the Bureau's August 24, 1984, action denying a petition for reconsideration of that action, filed by the Native American Heritage Preservation Project (NAHPP); (c) NAHPP's application for Commission review of that action; (d) an application for review of the January 12 action, filed by Save Mount Diablo, Inc. (SMD); and (e) related pleadings.[1] Essentially, NAHPP and SMD allege that the location of FCBI's tower on the north peak of Mt. Diablo, approximately nine miles south of Concord, would violate the Commission's environmental impact rules. Specifically, NAHPP and SMD contend that grant of FCBI's application has resulted in upsetting the

[1] In addition to opposition and reply pleadings of the parties, NAHPP submitted supplemental pleadings on January 7 and January 22, 1985.

biological stability of the area, has marred Mt. Diablo's scenic beauty, and has desecrated an historic and sacred site.

2. The controversy over the environmental consequences of locating the tower on the mountain dates back to 1977 when First Century Broadcasting (FCB) (predecessor to FCBI) filed its application for a new commercial television station to operate on the channel. Initially, FCB proposed to situate its 45 foot antenna atop a 45 foot tower amid several other towers of similar height on the North Peak of Mt. Diablo. Until then there had never been a broadcast presence on the mountain, but the 623 acres comprising the upper portion of the North Peak has been in continuous use as a telecommunications site for nonbroadcast radio services since it was purchased by Knox LaRue in the mid-1950s for that purpose. On January 2, 1980, when the State of California acquired the entire 623 acre parcel for inclusion in the Mt. Diablo State Park, it granted LaRue an exclusive easement for the seven existing communications sites on the top 43 acres of the North Peak. That easement, in part, gave LaRue (or any tenant) the right to replace or modify telecommunications facilities within the 43 acres so long as no tower exceeded 90 feet in height or 48 inches in facing width, without prior approval of the State of California. Although, at that point, FCB's tower met those specifications, several parties, including SMD, objected to FCB's proposal on environmental grounds. In designating the mutually exclusive applications of FCB and Bohannan Broadcasting Company for comparative hearing, the Bureau declined to specify an environmental issue, because it found the proposed site to be near several other antenna towers, thereby making grant of FCB's proposal a minor environmental action under Section 1.1305(b)(1) of the Commission's Rules (antenna farm exception). *Bohannan Broadcasting Company*, Mimeo No. 32571 (released June 11, 1980). FCB's application was ultimately granted on April 30, 1981.

3. On May 12, 1982, two days before the Department of the Interior granted National Landmark status to Mt. Diablo State Park,[2] FCBI sought to modify its construction permit to increase the overall height above ground level (AGL) from 90 to 140 feet and to increase its facing width from 18 inches to 48 inches.[3] No objection to the modification was filed, and the application was granted on June 8, 1982. Shortly, thereafter, FCBI proceeded to replace the existing structure with the authorized 140-foot structure, consisting of a 90-foot guyed tower and a 50-foot antenna. At the same time FCBI was pursuing its application at the Commission, it also was seeking local zoning approval, since its proposal would exceed the maximum permitted under the LaRue easement. Despite that fact, the

[2] In addition, Mt. Diablo is eligible to be listed in the National Register of Historic Places.

[3] FCBI also proposed to increase its effective visual radiated power, substitute a different transmitter, and embed the tower base in a concrete slab.

local Director of Building Inspection issued the appropriate permits for the increase. NAHPP appealed that decision to the Board of Supervisors of Contra Costa County, California. A hearing on the matter was held on March 22, 1983, at which time representatives of FCBI, NAHPP, and other interested parties presented their views to the Board. The record does not contain a full description of those proceedings, but we do have brief summaries of the subjects and arguments raised. It appears that the Board had before it information as to the sacred nature of the location to Indians, steps taken to ameliorate these concerns (including an already completed archeological survey), and "environmental disturbances" generally. After consideration of the matter, the Board, by a vote of four to one, concluded that the concerns of NAHPP would be mitigated by enforcement of the land use permit conditions, and NAHPP's appeal was denied.

4. On February 28, 1983, nearly eight months after the time for seeking reconsideration of the Commission's June 8, 1982, action had expired, SMD filed a petition for issuance of an order to show cause why FCBI's permit, as modified, should not be revoked. On April 8, 1983, the Bureau found that SMD had raised sufficient grounds to warrant further inquiry into the matter of FCBI's compliance with our environmental impact rules, and the permittee was required to submit a showing as to why its modification did not constitute a major environmental action, as defined by Section 1.1305 of the Rules. NAHPP also responded, arguing that FCBI's proposal would upset the biological stability of the area, would mar Mt. Diablo's scenic beauty, and would result in the desecration of a historic and sacred site.

5. In affirming its earlier grant of FCBI's modification application, the Bureau, on January 12, 1984, found the proposal to be a minor environmental action on two grounds: (1) because the overall height AGL would be under 300 feet and (2) because the proposed tower would be in an area in which similar antenna towers are clustered. 47 C.F.R. §§1.1305(b)(1) and (b)(2). The Bureau further stated that the objectors had not shown how the minor changes proposed by FCBI would affect the historical significance of the site or its scenic beauty, especially in light of the fact that other towers located there are far more obtrusive.[4] See Attachment. The Bureau added that the harm to those values, if any, occurred some 30 years ago with the construction of the several facilities that antedate this

[4] There is some disagreement among the parties as to the exact number of towers on the mountain and their size; however, at a minimum, there are four other towers ranging in height from 70 to 90 feet and in facing width from 18 to 48 inches. Some of the towers are guyed and one, that of the Standard Oil Company of California, supports nine parabolic antennas measuring between four and ten feet in diameter. In addition, although FCBI's 140-foot structure is the highest above ground level by 50 feet, another 90-foot tower further up the mountain is actually 26 feet above mean sea level higher than FCBI's.

proceeding. Finally, the Bureau refused to look into NAHPP's argument challenging the integrity of the proceedings of the local zoning authorities, since such matters are more properly a local concern. On February 16, 1984, both NAHPP and SMD contested the Bureau's action, the former seeking reconsideration and the latter seeking Commission review. Since Section 1.104(c) of the Rules requires the Commission to withhold action on an application for review if there is also a petition for reconsideration pending, the Bureau proceeded to consider NAHPP's petition.

6. In support of its petition for reconsideration, NAHPP argued that the Bureau's action was "vague, speculative and lacking [in] supportive evidence" when it found that any harm to the environment resulted 30 years ago with the construction of telecommunications facilities on the mountain. NAHPP maintained that each new tower or addition to an existing one is "a new act of desecration on the Spiritual World at the top of the mountain." NAHPP further argued that the Bureau erred in relying on the actions of the Contra Costa County Board of Supervisors, since those proceedings were allegedly invalid. Finally, it reiterated its previous argument that the construction resulted in the disappearance of sacred plants from the mountain. In denying NAHPP's petition, the Bureau, on August 24, 1984, noted that the petitioner had failed to challenge the core of the Bureau's January 12 action, namely, that construction of the FCBI tower represents only a minor environmental action under the National Environmental Policy Act (NEPA) as implemented by our Rules. Since religious concerns are not cognizable by NEPA or our Rules, the Bureau refused to consider NAHPP's argument as to the spiritual significance of Mt. Diablo. It also noted that NAHPP had failed to demonstrate that the construction of FCBI's tower caused extensive changes to surface features of the mountain or that those changes would affect the historical significance of the site or its scenic beauty. Finally, the Bureau refused to question the legitimacy of the local zoning proceedings, since they had not been invalidated by any judicial authority. On October 1, 1984, NAHPP sought Commission review of the Bureau's August 24 action.

7. In general, NAHPP argues that the Bureau failed to meet its obligation to enforce the First and Second Amendments to the Constitution, the National Environmental Policy Act, the American Indian Religious Freedom Act, and the National Historic Preservation Act, but makes specific allegations only with respect to NEPA. In that regard, it argues that FCBI's proposal should be considered a major environmental action since development of the mountain peak would have a significant religious and cultural impact on ten Native American tribes living in five states. It further notes that analyses of such impacts need to be taken

before any action is taken on FCBI's application. Presumably referring to the Bureau's determination that grant of FCBI's proposal cannot be considered a major environmental action due to the location of the tower in an antenna farm and height under 300 feet AGL, NAHPP points to that section of the Commission's Rules (47 C.F.R. §1.1305(c)) that authorizes the Commission to require the preparation of an environmental assessment even though it is not required to do so. Accordingly, NAHPP concludes that the Bureau may not rest on its conclusion that whatever environmental harm occurred, took place 30 years ago. Finally, NAHPP continues to argue that local authorities failed to follow notice and hearing regulations, that it relied on evidence that was not submitted into the record, and that NAHPP was not afforded an opportunity to appeal the Planning Commission's decision.

8. In support of its application for review, SMD first argues that FCBI failed to notify several entities of the filing of its modification application - including SMD, Contra Costa County, the State of California, and the National Park Service. As a result, it argues, it was unable to file an objection before the application was granted nearly a month later. SMD also contends that the Contra Costa County Planning Commission never approved the increase; rather, it states that the County Planning Director did so in the context of a general review of the Land Use Permit. Although that action was subsequently upheld by the County Board of Supervisors, SMD notes that the Planning Commission never had a hand in the decision. SMD also takes issue with the Bureau's conclusion that FCBI's proposal is a minor environmental action due to its location in an area in which similar antenna towers are clustered. In that regard, it argues that the FCBI tower is taller and more distinct that any other structure on the mountain, including the Standard Oil tower. SMD further argues that, contrary to what the Bureau concluded, FCBI's replacement of the old 45 foot tower with a 90 foot tower did cause substantial environmental damage. It contends that approximately ten cubic yards of rock were moved in order to lay concrete bases for the larger tower and for the generator and equipment sheds. In so doing, SMD maintains, a rare plant species, *Lewisia redivia*, was destroyed. SMD adds that new, taller utility poles were installed to bring 220 volt power to the mountain and that a series of ramps and catwalks have been built. Moreover, it states that the generator is noisy and that the Diesel smoke has blackened the remaining plants, thereby making the site unsuitable for recreational use. Finally, SMD argues that the Bureau's conclusion that the FCBI tower "would not significantly affect the scenic beauty of the North Peak" is a "subjective judgment based upon unwarranted and undocumented assumptions."

9. In opposition, FCBI argues that neither SMD nor NAHPP has raised any new issues or has cited any material legal or factual errors which would justify Commission review of the matter. It maintains that both objectors have failed to distinguish between the modification application itself and the use to Mt. Diablo as a communications site. It further notes that the environmental concerns voiced by SMD and NAHPP were fully litigated twice before the highest local zoning authority, the County Board of Supervisors, and that the Commission should not second-guess local authorities in that regard. Finally, FCBI contends that, despite SMD's argument to the contrary, it was sensitive to the environment in constructing the tower and, in fact, utilized a botanist in the supervision of the construction.

10. In response, NAHPP raises an issue new to these proceedings; namely, that FCBI committed fraud in the filing of its application. It maintains that FCB was incorporated on April 26, 1977, as a non-profit corporation and immediately changed its name to First Century Communications, Inc. (FCCI). Subsequently, it argues, on May 10, 1982, FCBI, an entirely new business, was incorporated as a for-profit stock holding company. NAHPP contends that fraud was committed on the Commission's processes when FCB applied for the original construction permit on May 23, 1977 - one month after it allegedly ceased to exist. It further argues that FCB's 1982 assignment of the construction permit to FCBI only compounds the fraud and is invalid. Moreover, in a supplementary pleading filed January 22, 1985, NAHPP argues that FCBI first proposed to participate in a second assignment of the construction permit and then reneged on that proposal without notifying the Commission.[5] It further argues that FCBI claims it is a wholly owned subsidiary of FCCI without substantiating that fact. FCBI replies that NAHPP's contentions in this regard are misplaced and urges us to ignore them. Having now set out all the arguments raised in this case, we turn now to their resolution.

11. First, SMD is incorrect in stating that FCBI had a duty to serve a copy of its application on SMD and others. Although an applicant should serve copies of any subsequent pleadings and amendments on all parties, of record, there is no requirement that it do so with the application itself. Indeed, at the time an application is filed, there are no parties of record. It is the Commission's responsibility to afford constructive notice to the public of the filing of all applications, and we did so in this case on May 26, 1982. Moreover, a copy of FCBI's application was maintained in FCBI's local public file as well as in the Commission's Public Reference Room in Washington, D.C., for all interested parties to review. Because FCBI's

[5] The alleged proposed assignee would have been First Century Limited, a newly formed limited partnership with FCBI as its sole general partner and majority capital contributor.

application was for a minor modification of its construction permit,[6] the application could have been granted immediately without affording a 30-day period in which petitions to deny could be filed. 47 U.S.C. §309(d). In any event, SMD did not voice any objection to the modification until nearly nine months after grant.

12. We turn now to NAHPP's allegations of fraud on the Commission's processes and find them without merit. After a careful review of FCBI's application, we find that FCB's Articles of Incorporation were, indeed, filed with California's Secretary of State on April 26, 1977, but they were amended on April 26, 1982, to change the name to FCCI. Two days later FCBI was organized as a wholly-owned subsidiary of FCCI. In this regard, we do not require proof that one entity is owned by another but, rather, rely on an applicant's representations. On June 9, 1982, FCCI sought to assign its construction permit to FCBI, and that application was subsequently granted on July 15, 1982. Since FCB was legally in existence until May 10, 1982, we find no irregularity in the fact that it applied for the channel some five years earlier, nor is there any basis for concluding that the subsequent assignment of license was invalid.

13. Before turning to the environmental aspects of the case, it is important to note just what is in issue here. We granted FCBI's initial application for a construction permit for a new station on April 30, 1981. Under Section 1.108 of our Rules, we can set aside such a grant within 30 days on our own motion. Under Section 405 of the Act, parties other than the Commission must seek reconsideration within 30 days. As a part of the statute, that provision cannot be waived by us. Similarly, on June 8, 1982, we granted the modification application that, among other things, increased the overall height of the antenna structure to 140 feet. In neither case did we set aside the grant nor did any party file a petition for reconsideration. The cited rule and statute reflect a substantial interest in administrative finality. The courts have also noted a strong policy in favor of administrative finality and have held that administrative proceedings will not be reopened unless there has been a fraud on the agency's or court's processes, or unless the result is manifestly unconscionable. *See Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238 (1944); *Greater Boston Television Corp. v. F.C.C.*, 463 F. 2d 268 (D.C. Cir. 1971). The Commission has applied that standard to its own proceedings. *See Radio Para La Raza*, 40 F.C.C. 2d 1102 (1973). We have rejected above the only charge of fraud on our processes. Moreover, for the reasons set out below, we do

[6] At the time FCBI's application was filed, a minor modification (as distinguished from a "minor environmental action") was defined as one in which the modification would result in a change of less than 50% of the area within the Grade B contour of the station. See former Section 73.3572(a)(1) of the Rules, as amended by *Processing of Broadcast Applications*, 56 R.R. 2d 941 (1984).

not believe the result is manifestly unconscionable. Thus, we review this case as a request for the extraordinary relief of revocation under Section 312(a) of the Act. In that regard, Section 312(a)(2) provides that we can revoke a license "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application." It is under this standard that the issues must be viewed.

14. Section 1.1305(a) of the Rules provides that an action is major within the meaning of the National Environmental Policy Act if it falls within one of the ten listed classes of communications facilities *and* if it is not considered a minor action pursuant to Section 1.1305(b). Here, FCBI's proposal initially falls within two of the criteria for a major environmental action:

> (a)(6) Communications facilities to be located in the following areas:
>
> * * * * *
>
> (iii) Facilities which will affect districts, sites, buildings, structures, or objects, significant in American history, architecture, archeology or culture, which are listed in the National Register of Historic Places or are eligible for listing;
>
> (iv) Facilities to be located in areas which are recognized either nationally or locally for their special scenic or recreational value.

Thus, the environmental procedures would have to be followed, unless the facilities are exempt by one of the categories set out in Section 1.1305(b). We believe that to be the case here for two reasons. First, the construction of a tower structure with an overall height of only 140 feet AGL qualifies as a minor environmental action pursuant to Section 1.1305(b)(2) of the Rules. Second, FCBI's tower is located in an area in which similar antenna towers are clustered as an antenna farm, thereby qualifying its construction as a minor environmental action under Section 1.1305(b)(1). As noted above, SMD objected to the Mt. Diablo site on environmental grounds when the initial FCBI application was on file. The Bureau denied SMD's objection in the Order designating FCBI's application for comparative hearing along with another applicant, on the ground that the tower was located in an antenna farm. SMD did not seek review of that decision. At that time, the location had not been acquired by the State as a part of the Park and had not been designated as an historical landmark. Thus, with regard to the initial construction permit, the pleadings present nothing not previously considered that would warrant not granting the initial permit.

15. SMD did not revive its opposition to the site until nearly two years later, almost nine months after FCBI's modification application had been granted. The question now is whether the added height and other changes are so great that the structure can no longer be considered similar to the others on the mountain. Not only did the Bureau conclude that it was not dissimilar, but the local zoning authority also approved the modification.

We agree with that conclusion. There are already several 90-foot towers on the North Peak, and, as we stated in footnote 4, *supra*, although FCBI's structure would be the highest on the mountain above ground level, there is another 90-foot tower further up the peak that is actually higher above mean sea level. Moreover, the widened 48-inch base, set in concrete and moored with guyed wires, is a feature of at least one other tower on the mountain, as well. This increase in base width would not normally be of such a nature as to be observable at a distance, and the tower is far less obtrusive than the 70-foot Standard Oil tower with its large parabolic antennas. See attached photographs. Further, in light of the more obtrusive nature of the Standard Oil tower and the presence of other similar towers, we believe that the modification does not significantly affect the scenic beauty of the North Peak. We note that SMD has itself submitted photographs of the North Peak demonstrating only a faint tower presence on the mountain from a distance. See attached photographs. Consequently, we conclude that FCBI's tower, as modified, is still similar to the others in the area. Therefore, it properly qualifies for the antenna-farm exemption in Section 1.1305(b)(1). Further, its construction has not significantly affected the scenic character of the mountain.

16. NAHPP contends that, despite the fact that grant of FCBI's proposal was a minor environmental action, the Commission could, nonetheless, require the preparation of an environmental assessment. It argues that such action is warranted here because the development of the North Peak would have a significant religious and cultural impact on several Native American tribes in the area. While this may be so, we do not see the need for an environmental narrative statement here. Not only is the construction of FCBI's tower already completed and the station licensed, but the root of the problem in NAHPP's eyes — FCBI's presence on the mountain at all — is no longer at issue, having been settled in 1981 with the grant of its initial application for the channel. In any case, it does not appear that the actual construction of the tower and its appurtenances caused sufficient harm to the environment to warrant our concern. Although ten cubic yards of rock may have been moved during the construction, SMD admits that FCBI took care not to blast in the area. Further, while some rare plant life may have been destroyed in the process, SMD concedes that the plant "is no longer dormant" and is now flourishing elsewhere on the mountain. Moreover, although we agree with SMD that power lines, ramps, and generator noise and smoke are not conducive to a recreational area, the top of the North Peak is devoted to telecommunications, not recreation, and the features complained of are entirely common for such use. Consequently, we are unpersuaded that an environmental narrative statement is required.

17. We note that there is disagreement among the parties as to whether it was the County Planning Commission, the Planning Director, or the Board of Supervisors that actually approved the height increase. For our purpose, however, it does not matter which local authority approved the increase. Moreover, NAHPP's allegations with respect to the invalidity of the local proceedings continue to be unsupported by any judicial decision to that effect, and it appears that the modification has been reviewed and upheld by the County Board of Supervisors. Consequently, we will not question the legitimacy of those proceedings. Finally, although NAHPP contends that the Bureau failed to meet its obligation to enforce the Constitution, the American Indian Religious Freedom Act, and the National Historic Preservation Act,[7] it has not alleged any facts to support those claims. Consequently, the applications for review filed by NAHPP and SMD will be denied.

18. Accordingly, IT IS ORDERED, That the applications for review filed by the Native American Historic Preservation Project and by Save Mount Diablo ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[7] As noted, this proceeding is in the nature of a revocation proceeding. Further, the initial grant was made well before the site was accorded national landmark status. Nevertheless, as a result of the pleadings filed in this case, the Bureau afforded the Office of Cultural Resource Opportunity of the Advisory Council on Historic Preservation an opportunity to comment on the modification of FCBI's authorized facilities. The Advisory Council declined the opportunity. We have, nevertheless, considered the eligibility of Mt. Diablo for inclusion in the National Register and it appears that the slight modification here would not adversely affect the historic significance of the mountain, especially in light of the fact that several other telecommunications tower are currently located there.

Reconsideration, facts not previously presented
Reconsideration, grounds for

Signing of a construction contract does not present new facts or changed circumstances to warrant reconsideration where Commission was explicitly aware of imminent possibility of contract signing in making its decision and decision was based on failure to sign contract in timely manner.
—*Graphic Scanning Corporation*

Satellite, Direct Broadcast

Commission will not reconsider its decision to cancel conditional construction permit due to failure to timely enter construction contract where construction contract is subsequently entered after due diligence deadline and after Commission action.
—*Graphic Scanning Corp.*

FCC 85-107

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of Graphic Scanning Corporation For Modification of Construction Permit to Establish an Interim Direct Broadcast Satellite System	File No. DBS 81-05-MP

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 1985; Released: March 12, 1985

BY THE COMMISSION:

1. On October 9, 1984, the Commission dismissed the above-captioned modification application of Graphic Scanning Corporation ("Graphic") for a DBS system and canceled the conditional construction permit granted to it as a "first-round" DBS applicant. *CBS, Inc., et al.*, FCC 84-477, released October 10, 1984. Graphic has filed a petition for partial reconsideration of that Order, seeking reinstatement of its permit and grant of its applica-

tion.[1] Direct Broadcast Satellite Corporation ("DBSC"), a DBS permittee, has opposed Graphic's petition.[2]

2. Graphic was originally granted a construction permit for an Interim Direct Broadcast Satellite ("DBS") system conditioned, in part, on its "due diligence" in the construction of its proposed system[3] and on any Commission action deemed appropriate upon the outcome of a case involving Domestic Public Land Mobile Radio Service applications in which a question was raised as to Graphic's status as a real party in interest (*A.S.D. Answer Service, Inc., et al.*, 47 Fed. Reg. 40896 (October 16, 1982)).[4] *CBS, Inc., et al.*, 92 FCC 2d 64 (1982). The Commission subsequently extended for all first-round permittees the time for compliance with the first part of the due diligence requirement until July 17, 1984.[5]

3. On July 17, 1984, Graphic submitted a statement which, it asserted, demonstrated its due diligence in implementing its proposed DBS system, and requested an extension until June 1, 1985, for the execution of a satellite construction contract. Graphic insisted that in order to proceed with the substantial investment required to begin a DBS operation, it must have a reasonable expectation that it would be able to operate its system without impairment by future Commission action resulting from any unfavorable resolution of the issues in the *A.S.D.* case. It contended that it had nonetheless demonstrated its willingness and desire to proceed with its DBS venture by beginning discussions with all satellite builders soon after its initial grant, and that it had attempted to reach a contract agreement with RCA Astro-Electronics ("RCA") that would provide for resolution of the *A.S.D.* contingency before the parties would be finally committed. Unable to reach such an agreement with RCA, Graphic proposed to advise the Commission whether it would enter an unconditional construction contract within forty-five days of an initial decision in the *A.S.D.* case, and in no case later than June 1, 1985. On September 25 and 26, 1984, Graphic filed letters indicating that an agreement had been

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[1] In the alternative, Graphic requests that it be considered as a "second-round" DBS applicant. In either case, it also seeks a finding that it has met the "due diligence" requirement (see para. 2, *infra*), meriting launch authority and an assignment of channels and orbital positions.

[2] Graphic requested an extension of time in which to file its reply to DBSC's opposition. That request was unopposed and is granted.

[3] Section 100.19(b) of the Commission's rules requires that a DBS permittee must begin construction or complete contracting for construction of its satellite within one year of the grant of a construction permit, and that the satellite must be in operation within six years of that grant. 47 C.F.R. §100.19.

[4] An initial decision, unfavorable to Graphic, was issued on January 9, 1985. *A.S.D. Answer Service, Inc., et al.*, FCC 85D-3.

[5] *Processing Procedures Regarding DBS Service* ("*DBS Processing Procedures*"), 95 FCC 2d 250 (1983).

reached between it and RCA and that a contract for satellite construction would be signed imminently.[6]

4. In the order at issue herein, the Commission reiterated a previous determination that "exceptions to the due diligence rule will not be allowed, except in the 'most extraordinary circumstances,'" and concluded that "Graphic did not timely show an ability and willingness to commit itself to its DBS system." *CBS, Inc., et al.*, FCC 84-477 at para. 14. The Commission noted that Graphic had had over one and one-half years to negotiate a contract prior to July 17, and that the Commission did not need to decide whether the uncertainty arising from the *A.S.D.* case might have affected its determination if Graphic had timely entered into a binding contingency agreement (usually unacceptable) to proceed in the event of a favorable disposition of that case. *Id.*

5. Graphic now argues that the Commission should reconsider its decision in light of the "new evidence" it presents in the form of a noncontingent construction contract with RCA signed on October 9, 1984 (with an effective date of October 10, 1984). Graphic contends that this new evidence is presented at the first opportunity to do so and that it demonstrates that the grounds for the Commission decision are no longer valid. It insists that a grant now of its modification application would be consistent with Commission objectives in that it would not be unfair to others who have dropped out of the first round of DBS applicants. It claims that other permittees (CBS, Inc. and Western Union Telegraph Company) had dropped out due to business considerations, not the time restriction, and that there is no evidence that they would have taken advantage of an extended deadline. It insists that its efforts are at least as great as those of DBSC, which is being permitted to "perfect" its showing after the due diligence deadline, and that Graphic is in fact accomplishing full compliance before DBSC. It also notes that two second-round applicants were given additional time to modify their applications.[7] It argues that any anticipated unfairness to second-round applicants has been eliminated by the Commission's action considering those applications and conditionally granting those which qualified.[8] Graphic concludes that such action would not diminish the due diligence standard by setting a bad precedent because of Graphic's unique circumstances. Finally, it requests that it at least be treated the same as RCA American Communications, Inc., which was placed in a subsequent group of applicants when its

[6] Graphic's claim of due diligence was opposed by two pending DBS applicants, Satellite Syndicated Systems, Inc. and Hughes Communications Galaxy, Inc. Those parties since have been granted conditional construction permits. *Satellite Syndicated Systems, Inc., et al.*, FCC 84-608, released December 6, 1984.

[7] *Satellite Syndicated Systems, Inc., et al., supra.*

[8] *Id.*

permit was canceled.[9]

6. DBSC contends that the difficulty arising for Graphic due to the pendency of the *A.S.D.* case was considered by the Commission in reaching its original determination. It continues that Graphic's own explanation indicates its initial unwillingness to take the risk of a contract without a contingency, which was a freely made business judgment, and that the ultimate settlement of a noncontingent contract before the initial decision in the *A.S.D.* case demonstrates that it could have been and should have been done sooner. It contends that the rules provide for reconsideration to consider a change in circumstances after the last opportunity to submit information, not for a correction of a failure to comply with a time deadline, and that to permit Graphic to be reinstated on the basis of a late performance would render the due diligence requirement meaningless.

7. Graphic has failed to justify reconsideration of this case. The untimely signing of a contract by Graphic does not bear on the validity of the grounds for the Commission's decision. That decision was explicitly based on Graphic's failure to comply with a specified procedure in a timely manner and included a determination that there were not exceptional circumstances sufficient to justify the failure. The Commission clearly was aware of a possible imminent signing of a construction contract,[10] and the subsequent actual signing does not represent a change in circumstances which has a bearing on the determination. Under these circumstances, it is not necessary to speculate whether other first-round applicants which discontinued their pursuit of DBS authorization would have continued if given the additional time that Graphic effectively has requested, and thus whether a contrary result would nonetheless be fair to them.[11]

8. Graphic's situation differs critically from that of DBSC. Although neither fully satisfied the due diligence requirement in a timely manner, DBSC entered a construction contract before the due diligence deadline. While one provision of that contract was unsatisfactory, the Commission concluded that it may not have been evident to applicants at the time that its inclusion would be disqualifying, and withheld final action until that provision could be changed by the parties.[12] Graphic's failure, on the other hand, was complete and without such excuse. The deadline stipulation was unequivocal and Graphic entered no contract of any sort.

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[9] *CBS, Inc., et al.*, FCC 84-477, *supra*.

[10] The Commission explicitly recognized the September 25 and 26 letters, *CBS, et al.*, FCC 84-477 at para. 13.

[11] On July 10, 1984, Western Union specifically requested that it be given the benefit of any extension of the deadline provided for any other party.

[12] *CBS, Inc., et al.*, FCC 84-477 at para. 7.

9. The two second-round applicants given additional time to modify their applications were in different circumstances than Graphic. They were still at the application stage of the proceeding, and their applications were considered substantially acceptable; their only shortcoming was failure to justify certain technical parameters which did not violate any clearly-defined standard set by the Commission. They had not been granted any privilege subject to a subsequent performance condition. Graphic, on the other hand, had already been granted construction authority and a general channel reservation, subject to performance of the due diligence requirement, and the steps necessary for performance had been made clear.

10. We presume that in requesting consideration as a second-round applicant in the event its petition for partial reconsideration is denied, Graphic intended to seek consideration of its application as soon as possible with whatever pending group of applicants with which it could properly be associated. At the time of its request, the second round of applications had long been cut off and a third round of applications was pending. Although that group was cut off on February 4, 1985, as Graphic's request was prior to that date, it will be permitted third-round inclusion and consideration if it so desires. (This is the same treatment accorded RCA American Communications, Inc. *CBS, Inc., et al.*, FCC 84-477 at paras. 16, 17.) It will be given ten days to so advise the Commission, and such election will not be construed as an abandonment of its right to appeal this decision or a reflection on its evaluation of the merits of its case.[13]

11. Accordingly, IT IS ORDERED, That the motion for extension of time filed by Graphic Scanning Corporation IS GRANTED.

12. IT IS FURTHER ORDERED, That the petition for partial reconsideration filed by Graphic Scanning Corporation IS DENIED.

13. IT IS FURTHER ORDERED, That Graphic Scanning Corporation shall advise the Commission within ten (10) days whether it elects status as a third-round DBS applicant.

14. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send by Certified Mail — Return Receipt Requested, a copy of this Memorandum Opinion and Order to each of the parties in this case.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[13] If Graphic elects to further pursue its application, the Commission will have to determine the effects, if any, of the findings in the *A.S.D.* case on Graphic's qualifications to be a DBS licensee before a permit can be granted.

Computer II
Shared Administrative Services
Subsidiary Company

Memorandum Opinion and Order adopted approving capitalization plans for subsidiaries of the regional Bell operating companies. In its *BOC Separation Order* the Commission permitted the divested regional Bell operating companies (RBOCs) to offer enhanced services and customer premises equipment (CPE) pursuant to a modified form of the structural separation conditions established in the *Second Computer Inquiry.* Pursuant to the Order, the regions filed a total of thirteen capitalization plans.
—*GTE Telenet Communications Corp.*

FCC 85-29

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
GTE Telenet Communications Corporation	File No. I-T-C-81-274
Application for authority to extend its packet-switched telecommunications services from the Continental United States to the United Kingdom, Western Europe and points beyond.	
In the Matter of	
Tymnet, Inc.	File No. I-T-C-81-210
Application for authorization under Section 214 of the Communications Act of 1934, as amended, to extend packet-switched data communications service between the United States and Western Europe.	
In the Matter of	
Procedures for Implementing the Detariffing of International Enhanced Services	RM-4435

MEMORANDUM OPINION AND ORDER

Adopted January 18, 1985; Released February 22, 1985

BY THE COMMISSION: COMMISSIONER DAWSON NOT PARTICIPATING; COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT

I. Introduction

A. Background

1. The Commission has before it petitions filed by Western Union International, Inc. (WUI), The Association of Data Processing Service Organizations (ADAPSO), RCA Global Communications, Inc. (RCA) and the International Communications Association (ICA) requesting reconsideration of the Commission's *Memorandum Opinion and Order*, 91 FCC 2d 232 (1982), (*Telenet Decision*), which affirmed a Bureau determination as to the applicability of the Computer II basic/enhanced dichotomy to the international arena.[1] Also, before the Commission is a request filed by RCA to stay the effectiveness of the *Telenet Decision*.[2] Oppositions to the petitions for reconsideration were filed by Aeronautical Radio, Inc. (ARINC) and International Business Machines Corporation (IBM) and replies were filed by RCA, WUI and ADAPSO. Also, several parties submitted comments in support of the petitions for reconsideration and RCA's stay request.

2. In addition, the Commission is considering the above-captioned petition for rulemaking and request for stay filed by ADAPSO. Comments were filed by the American Telephone and Telegraph Company (AT&T), IBM, ADAPSO, GTE Telenet Communications Corporation (Telenet), ARINC, RCA and the Western Union Telegraph Company (Western Union). ADAPSO, AT&T, ICA, GTE Telenet and the National Telecommunications and Information Administration (NTIA) filed reply comments.

3. The instant controversy originated in the action of the Chief, Common Carrier Bureau in authorizing Telenet and Tymnet, Inc. to extend their packet-switched data communications services between the United States and the United Kingdom and Western Europe.[3] In authoriz-

[1] *See* Amendment to Section 64.702 of the Commission's Rules and Regulations (Computer II), Tentative Decision, 72 FCC 2d 358 (1979), Final Decision, 77 FCC 2d 384 (1980), Reconsideration, 84 FCC 2d 50 (1980), Further Reconsideration, 88 FCC 2d 512 (1981), *affirmed*, C.C.I.A. v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

[2] Telenet and Control Data Corporation filed comments in support of the petitions for reconsideration and RCA's stay request. ADAPSO also filed in support of the stay request.

[3] Tymnet, Inc., File No. I-T-C-81-210, Mimeo No. 3223, released April 8, 1982; GTE Telenet Communications Corporation, File No. I-T-C-81-274, Mimeo No. 2765, released March 15, 1982.

ing Telenet and Tymnet to provide packet-switched services internationally, the Bureau noted that the proposed services as structured were enhanced under the criteria set forth in Computer II and, as such, would not be subject to regulation under Title II of the Communications Act of 1934, as amended, after January 1, 1983, the end of the transition period set forth in Computer II. The Bureau stated that approval under Section 214 of the act is not required to provide an enhanced service. It noted, however, that under Computer II the Commission established a transition period for detariffing any enhanced services that were being offered by a carrier prior to the effective date of the *Final Decision.* The Bureau found Telenet's and Tymnet's election to seek Section 214 authorization to extend their existing services to international points to fall within this transition period.

4. In granting the respective Section 214 applications of Telenet and Tymnet, the Bureau indicated that both Telenet and Tymnet had until January 1, 1983, to detariff their existing enhanced service offerings. In so doing, the Bureau noted that their status as carriers and the effectiveness of their authorizations were contingent upon their offering a common carrier communications service. To the extent these carriers are offering only enhanced services as of January 1, 1983, the Bureau stated that they would not be providing a common carrier communications service.

5. In response to the Bureau's authorizations, WUI filed applications for review and RCA filed a petition requesting that the Commission delete those parts of the Telenet and Tymnet authorizations that referenced the applicability of Computer II to the provision of international communications services. The gravamen of those filings was that the Bureau had acted outside the permissible scope of actions under Section 0.291 of the Commission's rules in applying Computer II to the international services of Telenet and Tymnet.

6. In our *Telenet Decision*, we rejected the arguments raised by WUI and RCA. In doing so, we affirmed the applicability of Computer II to the international sector. We determined that a generic finding was made in Computer II that all enhanced services, domestic and international, are outside the scope of Title II regulation. The instant petitions seek reconsideration of that determination.

B. Positions of the Parties

1. Notice and Sufficiency of the Record

7. RCA, an International Record Carrier (IRC), contends that the Commission neither expressly requested nor received comments on claimed differences in the applicability of the Computer II *Final Decision*

to the international arena. RCA argues that no notice was given and that, therefore, it was denied due process of law.

8. All petitioners argue that there is no record in this proceeding to support the Commission's finding that the Computer II basic/enhanced dichotomy applies internationally. Petitioners contend that the record does not recognize the differences between the domestic and international telecommunications marketplace. ICA argues that the Commission has placed the entire international service industry into a new regulatory environment without any record as to the ramifications of such action upon that industry and its customers. WUI, RCA and ADAPSO contend that the Commission has consistently recognized the differences between international and domestic communications and historically has applied separate regulatory schemes in view of these circumstances. Petitioners cite the *Resale*,[4] *Competitive Carrier*[5] and *TAT-4*[6] decisions as examples of separate regulatory schemes being applied to domestic and international services. Moreover, WUI and ADAPSO assert that the Commission's Computer II decision could not apply to the international sector since the Commission does not have end-to-end jurisdiction over international telecommunications and must therefore coordinate policies with foreign administrations.

9. The petitioners also contend that language in the Commission's *Final Decision* in Computer II expressly excluded the decision from the international arena.[7] ADAPSO argues that the Commission's use of the

[4] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), *recon.* 62 FCC 2d 588 (1977), *aff'd sub nom.*, AT&T v. FCC 572 F.2d 17 (2d Cir. 1978), *cert denied* 439 U.S. 875 (1978).

[5] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry, 77 FCC 2d 308 (1979), Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981), First Report and Order, 85 FCC 2d 1 (1980), and Second Report and Order (*Domestic Resellers*), 91 FCC 2d 59 (1982).

[6] American Telephone and Telegraph Co., 37 FCC 1151 (1964). *See* also Overseas Communications Services, 92 FCC 2d 641 (1982).

[7] They cite the following language in the *Final Decision*:

> Since the resale principle is implicit in the separation requirement that we adopt today, the basic issue still remains whether resale should be extended into the international arena. We conclude that it is inappropriate for us to address this issue in the current proceeding.
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> * * * * *
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> We believe that issues generic to the international arena should be addressed prior to imposing a resale requirement for enhanced services. We will defer consideration of this issue until completion of the international resale inquiry . . . Depending on the outcome of the international resale inquiry and the characteristics of the market at that time, we are free to examine whether the IRCs should be subject to the resale structure. 77 FCC 2d at 488-89.

term "resale" was intended to refer to structural separation and the concept of resale, which ADAPSO views as synonymous with the basic/enhanced dichotomy. Thus, ADAPSO contends that the Commission concluded in the *Final Decision* that the provision of enhanced services on a resale basis should be deferred pending the outcome of *International Resale*.[8] Petitioners also note the express wording of Section 64.702 of the Computer II rules which defines "enhanced services" as those services offered over facilities used in "interstate communications", and argue that if the Commission had intended Computer II to apply internationally, it would have used the term "foreign". See Appendix C. They argue that since these terms are mutually exclusive, by implication, Computer II was not intended to apply internationally.

10. ICA points out that the *Tentative Decision* proposed separate rules for the international communications marketplace. ICA interprets the absence of a separate section on international regulation in the Computer II rules ultimately adopted as further indication that Computer II was not intended to apply internationally.

11. WUI argues that the application of the basic/enhanced dichotomy represents a giant step towards international resale. Because Computer II holds that enhanced services are not common carrier services, WUI maintains that a non-carrier entity providing unregulated service using underlying regulated international facilities is by definition a reseller. WUI therefore concludes that the Commission has authorized the international resale of enhanced services by applying Computer II internationally.

12. Telenet questions the ability of unregulated non-common carrier entities to obtain circuits. Telenet argues that existing IRC tariff restrictions against resale of facilities and services would bar unregulated enhanced service providers from offering their services over IRC facilities. In addition, Telenet maintains that an unregulated entity could not obtain cable circuits on an Indefeasible Right of User (IRU) basis. It is also concerned that circuits may not be available from Comsat since the *Authorized User II* decision is on appeal.[9]

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[8] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Communications Services (International Resale), 77 FCC 2d 831 (1980).

[9] Proposed Modification of the Commission's Authorized User Policy Concerning Access to the International Satellite Services of the Communications Satellite Corporation, 90 FCC 2d 1394 (1982), *reversed and remanded*, ITT World Communications Inc. v. FCC, 725 F.2d 732 (D.C. Cir. 1984). Although the U.S. Court of Appeals for the District of Columbia Circuit vacated and remanded the *Authorized User II* decision, the court's decision does not alter our fundamental determination that all enhanced services are beyond the scope of Title II jurisdiction. Moreover, the court did not disagree with our legal analysis that Comsat may offer service directly to non-carrier entities, but instructed the Commission to first act on the related cases of "Earth Station Ownership" and "Direct Access". See

2. Foreign Considerations

13. ADAPSO, WUI and RCA fear adverse reactions on the part of foreign administrations if the basic/enhanced dichotomy of Computer II is applied internationally. WUI argues that foreign administrations view many of the services defined as enhanced as regulated services requiring carrier-to-carrier agreements. (WUI attached to its petition copies of telex messages from various administrations expressing concern with the ramifications of the *Telenet Decision.*)[10] ADAPSO fears that administrations may eliminate flat-rate private line service in favor of usage sensitive pricing if we permit users other than a Recognized Private Operating Agent (RPOA)[11] to provide telecommunications services. ADAPSO also states that foreign administrations may not wish to interconnect with certain carriers who provide enhanced services. ADAPSO sees the potential for users being deprived of new service offerings if the basic/enhanced dichotomy is applied internationally.

14. WUI, ADAPSO and ICA express concern that our decision to apply the Computer II basic/enhanced dichotomy internationally may result in anticompetitive practices and reduce competition in the U.S. portion of the international services market. There are two aspects to this argument. First, the petitioners cite a letter from seven Nordic administrations (Nordtel) suggesting the possibility that enhanced services provided from the U.S. to these administrations would be provided by only one or a limited number of U.S. carriers.[12] It is argued that adherence to

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Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for U.S. International Service Carriers, 90 FCC 2d 1446 (1982) (Notice of Inquiry in CC Docket No. 82-548) and Modification of Policy on Ownership and Operation of U.S. Earth Stations that operate with the INTELSAT Global Communications Satellite System, 90 FCC 2d 1458 (1982) (Notice of Inquiry in CC Docket No. 82-540). Now that the court's conditions have been satisfied, we recently affirmed our *Authorized User II* decision. See Proposed Modification of the Commission's Authorized User Policy Concerning Access to the International Satellite Services of the Communications Satellite Corporation, FCC 84-633, 100 FCC 2d _____, 50 F.R. 2552 (January 18, 1985).

[10] Attached to WUI's petition were messages from the following foreign administrations: Austria, Belgium, Fiji, Germany, Italy, Korea, Norway, Singapore, Spain, Sweden, Switzerland and the United Kingdom.

[11] A "Recognized Private Operating Agency" is defined in the International Telecommunications Union (ITU) Convention as "[a]ny individual or company or corporation, other than a governmental establishment or agency, which operates a telecommunications installation intended for an international telecommunications service or capable of causing harmful interference with such a service" and which "operates a public correspondence or broadcasting service and upon which the obligations provided for in Article 44 of the Convention [relating to the duties of Members to abide by the Convention and the Regulations] are imposed by the Member in whose territory the head office of the agency is situated, or by the Member which has authorized this operating agency to establish and operate a telecommunication service on its territory."

[12] Letter of June 30, 1982 from Chairman of Nordtel to U.S. international service providers.

such a practice would lessen competition and could cause U.S. carriers to be in violation of anti-whipsawing policy.[13] Second, WUI, ICA, and ADAPSO argue that deregulation of enhanced services internationally would permit foreign companies to invade the U.S. portion of the international market with unregulated resale subsidiaries. The petitioners fear that a foreign administration and its U.S. affiliates could structure their rates and services in such a way that no U.S. IRC or enhanced service provider could successfully compete, resulting in end-to-end service being provided by a foreign administration and its unregulated U.S. affiliates. Petitioners maintain that these unregulated enhanced service providers would be outside the scope of Commission jurisdiction. ICA questions the effectiveness of controls at the Commission's disposal to protect the interests of carriers, enhanced service providers and users in the United States.

3. The Relationship between the Record Carrier Competition Act of 1981 (RCCA) and Computer II

15. WUI argues that the Congressional goal of the RCCA[14] cannot be met if the basic/enhanced dichotomy is applied to international communications. According to WUI, Congress intended there to be universal access to teletypewriter networks to increase the level of competition and use of record services. Therefore, WUI argues that all carriers were intended to have equal interconnection rights based on equal rates, terms and conditions. If Computer II is applied internationally, WUI contends that an enhanced service provider could refuse to interconnect other carriers to its own international services which are "enhanced" and beyond the Commission's jurisdiction. WUI uses Western Union's TWX services as an example of the potential problem. Since Western Union treats its domestic Telex/TWX interconnections as enhanced non-carrier services, WUI argues that application of Computer II internationally to Telex/TWX interconnections would cause these services to no longer be regulated. WUI contends that once Western Union detariffs its international services it would have no obligation to interconnect its monopoly base of TWX subscribers with any other carrier since the RCCA's interconnection obligation applies only to common carrier services. Thus, only Western Union could interconnect TWX subscribers with overseas telex service.

[13] "Whipsawing" is a practice by which a foreign administration, through use of its monopoly position, exacts a higher division of tolls or a more favorable accounting rate from a carrier as a precondition to the establishment or continuation of service.

[14] P.L. 97-130, 95 Stat. 1687.

4. RCA's Request for Stay

16. In support of its request to stay the effectiveness of the *Telenet Decision*, RCA argues that it was denied due process because it did not have notice and an opportunity to be heard on the applicability of Computer II internationally. RCA contends that it will be exposed to substantial injury if a stay is not granted. RCA acknowledges that quantifying the extent of injury is difficult, but states that some portion of its overseas services and customers could be exposed to diversion if the *Telenet Decision* is not stayed. It asserts that no parties will be injured if the status quo is maintained. According to RCA, the public will not be deprived of service and the possibility of disruption and confusion in the marketplace will be avoided. Finally, it contends that the public interest will be served because a stay would allow the Commission to clarify this matter with foreign administrations.

C. Oppositions to Petitions

17. ARINC filed an opposition to the RCA petition and IBM filed an opposition to all petitions for reconsideration. ARINC states that the Commission made a determination in Computer II that enhanced services are not common carrier services and not subject to regulation under Title II of the Communications Act. ARINC contends that the regulatory classification of services established by the Commission cannot be affected by whether the services are offered domestically or internationally. In addition, it challenges RCA's assertion that language in the *Final Decision* deferring consideration of a separate subsidiary requirement evidenced the Commission's intention not to apply the basic/enhanced dichotomy internationally. It contends that the question of whether to apply a separate subsidiary requirement could not logically arise unless the Commission had already agreed to differentiate between basic and enhanced international services. Finally, ARINC argues that the detariffing of enhanced services will not affect the control of foreign correspondents over the foreign half of international circuits.

18. Similarly, IBM maintains that the Commission's legal conclusion that enhanced services are not common carriage within Title II is conclusive as to the applicability of Computer II internationally since Title II does not differentiate its jurisdictional scope for international and domestic services. With respect to the petitioners' fears that various adverse consequences will result should the basic/enhanced dichotomy be applied internationally, IBM asserts that the Commission has not decided or otherwise prejudged these issues. Specifically, IBM contends that the Commission has not ruled in favor of unrestricted international resale. IBM notes that the issue of the appropriateness of removing tariff provisions restricting resale of international services is pending before

the Commission.[15] Thus, as long as those provisions remain in effect, services covered by those provisions will not be resold. IBM notes that as a result of the *Authorized User II* decision[16] Telenet and Tymnet will be able to obtain overseas satellite circuits from Comsat to provide international enhanced services.

19. IBM submits that the Commission's deregulation of enhanced service providers affects directly only the domestic legal status of those entities and does not affect the manner in which foreign administrations provide service. With respect to the concern expressed over possible misunderstanding on the part of foreign administrations, IBM suggests that the consultation process may be helpful. IBM views consultation as a means of eliminating confusion about the meaning of the *Telenet Decision* and avoiding the consequences of misapprehension of the Commission's actions.

20. Responding to arguments that undesirable consequences will flow from the Commission's actions, IBM characterizes those consequences as hypothetical situations which are not the direct result of the application of Computer II internationally. IBM views the specter of foreign invasion of the U.S. portion of the international marketplace by wholly-owned subsidiaries of foreign administrations as not being caused by the Commission's decision to deregulate enhanced service providers. IBM also disputes WUI's conclusions with respect to the RCCA and its interconnection requirement. IBM suggests that the Commission will have ample opportunity to consider the effects of the subject order and the interconnection requirements under the RCCA.

D. ADAPSO Petition for Rulemaking and Request for Stay

21. Subsequent to the filing of the subject petitions for reconsideration, ADAPSO filed a petition for rulemaking so that the Commission could consider the most appropriate means of implementing Computer II internationally. ADAPSO also requests the Commission to stay implementation of the *Telenet Decision* pending the outcome of its petition for rulemaking.

22. ADAPSO's petition is based on its assertion that there are critical issues which have not yet been addressed by the Commission that must be resolved before Computer II is implemented internationally. These issues stem from the fact that international telecommunications services and facilities are not wholly within the Commission's jurisdiction.

23. ADAPSO's petition focuses on three general issues. The first group of issues relates to the feasibility of implementing Computer II without the agreement or acquiescence of foreign telecommunications

[15] *See* fn. 8, *supra.*

[16] *See* fn. 9, *supra.*

administrations. ADAPSO argues that some means must be developed of ensuring that U.S. enhanced service providers who wish to provide international service can do so, consistent with the terms of the ITU Convention and CCITT Recommendations. The second category of issues focuses on the competitive implications of extending Computer II to the international arena. Specifically, ADAPSO is concerned about safeguards available to prevent anticompetitive conduct on the part of foreign-owned enhanced service providers and the need to extend safeguards to carriers other than AT&T, such as Comsat and the IRCs. The third category involves the efficacy of the Commission's anti-whipsawing policy when international enhanced services are provided by regulated U.S. carriers that have settlement agreements. ADAPSO fears that the provision of unregulated services by these entities may allow foreign PTTs to exact concessions that may adversely impact basic service ratepayers. According to ADAPSO, these previously unaddressed issues must be considered if the Commission is to be successful in implementing Computer II internationally. ADAPSO does not believe that the Commission presently has an adequate record upon which to act.

24. In support of its petition for rulemaking, ADAPSO makes arguments that it previously raised in its petition for reconsideration. For example, ADAPSO urges the Commission not to implement Computer II in such a way that is perceived as a unilateral effort to restructure the manner in which international communications are provided. ADAPSO also reiterates the fact that overseas communications are viewed as either basic or data processing whereas in the U.S. all enhanced services would not be data processing. This allegedly creates a problem under the ITU Convention and CCITT Recommendations which contemplate service being provided by an administration or RPOA. ADAPSO fears that there may be confusion on the part of foreign administrations if they are unable to distinguish between those enhanced service providers acting like an administration and those acting in conformance with CCITT Recommendations. To remedy this situation it urges the Commission to consider adoption of a program that would confer RPOA status on enhanced service providers who wish to provide services that would be considered "telecommunications" as defined by the ITU Convention and CCITT Recommendations. In addition, ADAPSO asks the Commission to seek bilateral and multilateral agreements to assuage the concerns of foreign administrations.

25. ADAPSO also urges the Commission to examine whether safeguards placed on AT&T are adequate in light of the AT&T's ability to compete in both voice and record markets. ADAPSO fears that AT&T's dominance may increase because its subsidiary may unfairly benefit from operating agreements AT&T has throughout the world. It also argues

that offering of both basic and enhanced services by a carrier such as Comsat is not symmetrical with the separation of basic and enhanced services envisioned by Computer II. Similarly, it also questions whether the IRCs, due to their unique market power resulting from their interests in underseas cables, should be subject to competitive safeguards to prevent abuse.

26. In this regard, ADAPSO argues that we have never clarified what we mean by the terms "own" and "ownership" when applied to basic transmission facilities. ADAPSO views this distinction as being crucial insofar as it relates to the obligation of a facilities-owning carrier under *Computer II* to secure underlying transmission facilities pursuant to tariff. Carriers not owning transmission facilities are not subject to such a requirement. Application of *Computer II* to international telecommunications, ADAPSO argues, requires a precise answer to the question of what is ownership. Specifically, ADAPSO notes that under the Commission's *Authorized User II* decision all users will be able to secure circuits from Comsat. ADAPSO argues that it is not clear whether a carrier leasing these circuits from Comsat will be deemed to own these circuits or to be leasing them for the purpose of resale. ADAPSO also believes the Commission must clarify whether IRUs in submarine cable facilities constitute ownership for Computer II purposes, and whether carriers must acquire them under tariff. Alternatively, ADAPSO argues that the Commission must decide whether an enhanced service provider should have the right to purchase IRUs. Finally, ADAPSO notes the tariffs of the IRCs currently restrict the resale and shared use of their basic transmission services. If the IRCs are permitted to offer enhanced services directly or through a separate subsidiary, and if IRUs are considered ownership interests, ADAPSO questions whether these resale restrictions prohibit an IRC or its subsidiary from providing enhanced services in the same manner that they restrict other third parties from using these services to provide enhanced services. And, if an RPOA accredidation program is implemented, ADAPSO states that the Commission must decide whether these resale restrictions prohibit an RPOA from providing enhanced services over IRC facilities.

27. The comments in response to ADAPSO's petition evidence a mix of views. GTE Telenet, RCA, ICA and NTIA generally support the petition for rulemaking before Computer II policies are implemented internationally. They cite the difficulties inherent in international communications and stress the need for an implementation proceeding to accomplish the orderly application of *Computer II* without the adverse consequences raised in the ADAPSO petition. Specifically, they reiterate concerns expressed by ADAPSO with respect to the elimination of flat-rate private line service, potential anticompetitive conduct by foreign-controlled U.S.

enhanced service providers, the need for additional competitive safeguards for AT&T, Comsat and the IRCs, the potential for undermining the Commission's accounting and settlements policies and the need for some type of program to confer RPOA status on enhanced service providers in order to ensure their acceptance by foreign administrations.

28. Comments filed by AT&T, IBM and ARINC view ADAPSO's petition for rulemaking as a repackaging of the same arguments raised in the petitions for reconsideration of the *Telenet Decision*, and oppose a stay of the *Telenet Decision.* They concede that confusion may exist among foreign administrations and that the Commission may have to take further action to ensure acceptance by foreign administrations. They also support the initiation of an RPOA registration program as proposed by ADAPSO if necessary. However, they argue the public interest benefits of Computer II should not be delayed internationally.

29. IBM views the issues raised by ADAPSO as being unrelated to Computer II. IBM is concerned about the regulatory framework that will exist if the *Telenet Decision* is stayed and views any return to the Computer I standards as being unworkable.

30. AT&T and ARINC view the issue of safeguards with respect to AT&T and Comsat as having been exhaustively considered in other proceedings. With respect to the imposition of competitive safeguards on the IRCs, they note that the issue is to be decided in the Commission's *International Resale* inquiry. In any event, ARINC notes that the provision of enhanced services falls within the Commission's ancillary jurisdiction under Title I.

31. AT&T states that it plans to accommodate the needs of non-carrier entities by revisiting its tariff offering of international private line service to allow third-party use by U.S. non-carrier entities that enter into operating agreements with foreign administrations. AT&T states that it has had several discussions with foreign administrations and the CCITT, and as a result, feels confident that the proposed tariff provisions will not provoke an adverse reaction from foreign administrations. AT&T asserts that foreign administrations have the freedom to deal or not to deal with non-carrier entities. On the uniform settlement issue and the possibility of whipsawing, AT&T notes that the policy does not apply to private line services. Both AT&T and ARINC argue that the Commission can exercise ancillary jurisdiction to insure compliance with Commission policies.

II. Discussion

32. In the *Telenet Decision* we were presented with a narrow issue *i.e.*, the applicability of the basic/enhanced dichotomy to international services. We are now asked to reconsider our affirmance of the applicability of Section 64.702(a) of the Commission's Rules and Regulations to the international arena. In addition, we are asked to stay this decision and

initiate a rulemaking to consider the most appropriate means for its implementation. Various parties argue that the Computer II decisions did not apply to the international arena and that sufficient notice and record are lacking for any such determination.

33. As discussed below, we believe it is clear that our Computer II basic/enhanced dichotomy applies to services provided internationally and that petitioners' arguments to the contrary are without merit. Having considered the petitions and motions before us, we are affirming our prior action and denying RCA's and ADAPSO's request for stay. In so doing, we shall separately discuss the adequacy of the notice given, the record support for our determination, the implications of applying the basic/enhanced dichotomy to international services and ADAPSO's petition for rulemaking.

A. The Computer II Proceeding

1. Notice

34. RCA argues that the Commission did not give notice of its intention to extend the basic/enhanced dichotomy of Computer II to the international sector. RCA argues the Commission never requested or received comment on the application of Computer II to the international arena and that it was denied due process of law as a result.

35. The record does not support RCA's position. One need only examine the plain language of the Commission's Computer II decisions to conclude that such a contention is without merit. In 1979 we adopted a *Tentative Decision and Further Notice of Inquiry and Rulemaking* (*Tentative Decision*), 72 FCC 2d 358 (1979). In so doing we noted that, while the basic/enhanced proposal set forth therein was applicable only to the domestic arena, consideration should also be given to the appropriate structure to be applied internationally. *Tentative Decision* at 398, 437. We stated that a bifurcated approach to the regulation of domestic and international services ". . . may, over the long term, create problems with respect to the possible expansion of 'enhanced non-voice' services internationally, particularly on a competitive basis." *Id.* at 437. Accordingly, we specifically sought comment on this bifurcated approach in stating:

> . . . we solicit comment on whether we should expand our Tentative Decision to include *international services*, and whether a bifurcated policy will inhibit the offering of new enhanced non-voice service by existing carriers or new competitive carriers." (emphasis added) *Id.*

36. In addition to explicitly seeking comment on whether the *Tentative Decision* should be expanded to include international services, we enumerated specific options which the Commission would consider in

reaching a final decision.[17] *Tentative Decision* at 440-41. Several of these options, explicitly raised the possibility of applying the basic/enhanced dichotomy to the international arena and requiring carriers to provide enhanced services through a separate subsidiary.[18]

37. ADAPSO acknowledges that we raised the prospect of applying the "resale structure" to the IRCs, but argues that in so doing the Commission was only asking whether the basic/enhanced dichotomy should apply to international services, and not whether the Commission should impose a separate subsidiary requirement on the IRCs, since it had already decided to do so for IRC provision of data processing services. See Appendix B. The implication being that when in the *Final Decision* we deferred subjecting the IRCs to the resale structure we, in essence, deferred applying the basic/enhanced dichotomy to international services. This latter point is discussed below and rejected. ADAPSO's argument that the phrase "resale structure" applied only to the basic/enhanced dichotomy and not to the separate subsidiary requirement is without merit. In setting forth conceptual framework of our resale structure, we specifically stated that "carriers owning . . . transmission facilities may provide 'enhanced non-voice' services only through a separate corporate entity on a resale basis." *Tentative Decision* at 396. While it is true that the *Tentative Decision* proposed subjecting IRCs to a separate subsidiary requirement for their data processing services, the *Tentative Decision* did not propose to subject IRCs to a separate subsidiary requirement for the broader category of enhanced services. The Commission was asking whether the IRCs should be subject to a separate subsidiary requirement in the event we were to apply the basic/enhanced dichotomy to all services including those provided internationally.

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[17] We set forth the following options, among others, that would be considered by the Commission in reaching a final decision:

> (2) Adoption of the resale structure of the Tentative Decision; however, a) extend the resale structure to the IRCs, and/or b) limit the application of the resale structure to those underlying carriers having the potential to engage in cross-subsidization or other anti-competitive behavior;
>
> (3) Adoption of the resale structure of the Tentative Decision; however, exclude from Title II jurisdiction "enhanced non-voice" services;
>
> (4) Adoption of the resale structure of the Tentative Decision with enhanced non-voice services excluded from Title II regulation (same as #3); however a) extend the resale structure to the IRCs, and/or b) limit the application of the resale structure to those underlying carriers having the potential to engage in cross-subsidization of other anticompetitive behavior. [footnote omitted]

Tentative Decision at 441.

[18] The terms resale structure and separate subsidiary are used interchangeably.

38. It is well-established that due process and the Administrative Procedure Act (APA) require notice and opportunity to be heard. *E.g., North American Pharmacal, Inc. v. Dept. of H.E.W.*, 491 F.2d 546 (8th Cir. 1973). Where a party to an administrative proceeding is reasonably apprised of issues in controversy, notice is deemed sufficient. *Savina Home Industries v. Secretary of Labor*, 594 F.2d 1358 (10th Cir. 1979). As early as 1979 all parties were on notice that the Commission was considering application of its Computer II policies internationally. Due process requires no more.

39. The U.S. Court of Appeals for the District of Columbia found that this Commission met notice requirements for its Computer II state preemption of CPE regulation in *C.C.I.A. v. FCC*, 693 F.2d at 217. The court found that by raising as a possibility that it would deregulate all CPE in the *Tentative Decision*, the Commission gave sufficient notice of its intent to detariff CPE and to preempt state detariffing. The court found that even though the Commission had not expressly raised the preemption issue for comment, this was the natural result of its deregulation proposal. Therefore, the court reasoned, parties were on notice of possible preemption and had adequate opportunity to raise their objections. By comparison, the Commission expressly sought comment on the possibility of international applicability in its *Tentative Decision.* Thus, the requirements of due process and the APA have been more than adequately complied with in the context of this proceeding.

2. Record Support for Application of Basic/Enhanced Dichotomy Internationally

40. Notwithstanding the sufficiency of the notice provided, the argument is made that we did not adopt any of the proffered options that would extend the basic/enhanced dichotomy of services provided internationally. The contention is made that the Commission did not intend to apply the basic/enhanced definitional structure to the international arena, and that the record is insufficient to support any such determination. Both these arguments are without merit. An examination of the record in *Computer II* clearly evidences that the basic/enhanced dichotomy adopted in the *Final Decision* applied to all services provided over common carrier facilities, including enhanced services provided over international facilities of U.S. carriers.

41. As a preliminary matter, it is helpful to understand the status of Section 64.702 of the Commission's Rules and Regulations prior to Computer II. See 47 C.F.R. § 64-702 (1979). These pre-Computer II rules, set forth in Appendix A, embodied a definitional structure adopted over a decade ago in the *First Computer Inquiry* (Computer I) to delineate services provided over common carrier facilities that the Commission was not going to regulate as common carrier communication services under

Title II.[19] Of the four categories of services set forth in Appendix A, those falling into the "data processing" and "hybrid data processing" categories were not subject to Title II regulation. This Computer I determination applied to both domestic and international services provided over common carrier facilities. See Computer I *Final Decision and Order*, 28 FCC 2d 267, 282 (1971). Moreover, these rules required international carriers to provide their unregulated data processing services through a separate subsidiary. *Id.* Accordingly, the regulatory environment prior to Computer II was that Section 64.702 was the vehicle used by this Commission to delineate those domestic and international services that would not be subject to common carrier regulation.

42. For reasons which we need not belabor here, the Computer I definitional structure over time proved inadequate for delineating those services that are the proper subject of common carrier regulation. Accordingly, in Computer II we proposed, among other things, to amend Section 64.702 so as to more clearly delineate regulated communication services and unregulated data processing services. In our Computer II *Tentative Decision* we proposed to distinguish between basic and enhanced services and also to further differentiate among enhanced services by attempting to define data processing services. See Appendix B and compare Section 64.702(a) and (c). We proposed that enhanced services would not be regulated domestically and data processing services (a subset of enhanced services) would be regulated internationally. This meant that enhanced services provided internationally which were not data processing services could be subject to common carrier regulation. Thus, under the *Tentative Decision*, some enhanced services could be subject to Title II regulation depending on the communications or data processing nature of the services and whether the service was provided domestically or internationally.

43. As indicated in paragraph 35, *supra*, we specifically sought comment on the viability of a bifurcated approach, especially in light of the possible expansion of enhanced services internationally. In fact, three of the options specifically set forth for consideration in reaching a final decision would have resulted in extension of the basic/enhanced dichotomy to the international arena.

44. In rendering a final decision in Computer II we considered comments filed by various parties on the definitional structure set forth in the *Tentative Decision*. *Final Decision* at 400-402. We also specifically considered comments relating to extending the resale structure interna-

[19] First Computer Inquiry, Tentative Decision, 28 FCC 2d 291 (1971); Final Decision, 28 FCC 2d 267 (1971), *aff'd in relevant part sub nom.* GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973) *decision remand*, 40 FCC 2d 293 (1973).

tionally. *Id.* at 407-08. After having given full consideration to these comments we stated the following:

> While there is some agreement among the parties as to the appropriateness of distinguishing between basic and enhanced services, there is no consensus that adoption of the proposed definitional scheme for distinguishing the communication/data processing nature of enhanced services would be in the public interest.
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> * * * * *
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> After three attempts to delineate a distinction between communications and data processing services and failing to arrive at any satisfactory demarcation point, we conclude that further attempts to so distinguish enhanced services would be ultimately futile, inconsistent with our statutory mandate and contrary to the public interest. In coming to his conclusion we are convinced that pursuing such a course of action would not accomplish the objectives of this proceeding i.e., 'to (a) foster a regulatory environment conducive to the stimulation of economic activity in the regulated communications sector with respect to the provision of new and innovative communications-related offerings, and (b) enable the user to optimize his use of common carrier communications facilities and services by taking advantage of the ever increasing market applications of computer processing technology.' *Tentative Decision* at para. 59. It is apparent, that over the long run, any attempt to distinguish enhanced services will not result in regulatory certainty . . . As the market qualifications of computer technology continue to evolve we believe that attempts to distinguish enhanced services either will fail or result in an unpredictable and inconsistent scheme of regulation.
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> * * * * *
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> In addition to the fact that the record in this proceeding does not support the conclusion that greater regulatory certainty would result by adopting the proposed definitional structure, there are other factors which militate against classifying enhanced services for regulatory purposes. Such a regulatory scheme would most likely result in the direct or indirect expansion of regulation over currently unregulated vendors of computer service and deprive consumers of increased opportunities to have services tailored to their individual needs.

Final Decision at 424-25.

45. Based on the foregoing, we came to the following conclusion:

> Based on this record, the mandate of this Commission in a rapidly changing technological environment, the market developments resulting from the confluence of technologies, the impossibility of defining at the enhanced level a clear and stable point at which 'communications' becomes 'data processing,' the ever increasing dependence upon common carrier transmission facilities in the movement of information, the need to tailor services to individual user requirements, and the potential for unwarranted expansion of regulation, we conclude that the public interest would not be served by any classification scheme that attempts to distinguish enhanced services based on the communications or data processing nature of the computer processing activity performed. Accordingly, we conclude that all enhanced computer services should be accorded the same regulatory treatment and that no regulatory scheme could be adopted which would rationally distinguish and classify enhanced services as either communications or data processing.

Final Decision at 428.

46. Our fundamental determination was that all enhanced services should be accorded the same regulatory treatment. It is apparent, therefore, that this Commission rejected the bifurcated approach set forth in the *Tentative Decision.* Whatever regulatory scheme was to be applied to enhanced services, it would apply to all enhanced services regardless of the communications or data processing nature.

47. Consistent with this determination, we proceeded to set forth the regulatory structure that would govern the provision of enhanced services. In so doing we stated:

> Insofar as enhanced services are concerned, there are two options—subject all enhanced services to regulation, or refrain from regulating them *in toto.* We believe that consistent with our overall statutory mandate, enhanced services should not be regulated under the Act.

Final Decision at 428. See also *Telenet Decision* at para. 11.

48. We concluded that "basic transmission services are traditional common carrier communication services and that enhanced services are not." *Id.* at 430. The Commission made a generic finding as to the applicability of Title II of the Act and "delineated those services which are outside the scope of Title II." 84 FCC 2d at 90. We concluded, that as a factual matter, "enhanced services are not common carrier services." *Id.* at 89. No differentiation was made among various enhanced services in determining the parameters of Title II regulation.

49. Petitioners appear to challenge our assertion that "Title II does not recognize or otherwise establish a separate regulatory scheme for domestic and international services." *Telenet Decision* at para. 13. They cite instances where this Commission has accorded separate or different schemes of regulation in the domestic and international arena. See paragraph 8, *supra.* What petitioners misapprehend is that in Computer II we made a determination as to the scope of our Title II jurisdiction. We made a generic determination that all enhanced services are outside the scope of our Title II jurisdiction.[20] Having made this jurisdictional determination, the question of according separate regulatory treatment under Title II to a certain class of enhanced services, i.e. those provided internationally, is moot. Unlike the present situation, the cases cited by petitioners involved the exercise of the Commission's Title II jurisdiction with respect to the provision of common carrier facilities or services.

50. In light of the foregoing, we believe it is without merit to suggest now that international enhanced services provided over common carrier facilities were intended to be excluded from the scope of our decision. First, we made a generic finding under Title II of the Communications Act. Our jurisdiction under Title II is premised on the regulation of

[20] The Commission does have ancillary jurisdiction over these services as discussed in paragraph 71, *infra.*

common carrier communications services. Having determined in the *Final Decision* that enhanced services are not common carrier communications services and that such services should be accorded the same regulatory treatment, their regulation under Title II is foreclosed.

51. Second, the facts belie arguments that suggest the Commission intended to maintain the status quo internationally. The simple fact of the matter is that this Commission rejected the continued validity of the Computer I criteria used to determine those international services that would be subject to common carrier regulation. This was largely because we believed it would be too difficult to distinguish between enhanced services such as data processing and those enhanced services with data processing and communications characteristics.[21] Moreover, we did not adopt the bifurcated approach set forth in the *Tentative Decision.* In rejecting the bifurcated approach of the *Tentative Decision*, we adhered to the approach established in Computer I of maintaining uniform treatment for non-common carrier services, regardless of whether they were provided domestically or internationally. In so doing, Section 64.702(a) of the Commission's Rules and Regulations was modified in the *Final Decision* to reflect the fact that all enhanced services would not be subject to Title II regulation. See Appendix C.

52. Given our rejection of the Computer I standards for distinguishing those international services subject to common carrier regulation, no basis would exist for determining those international services that would be regulated under Title II apart from application of the Computer II basic/enhanced dichotomy. Therefore, one need only assume, arguendo, the validity of petitioner's argument to see that it is without merit. Regulation of all enhanced services would have greatly expanded the scope of regulations to entities never before regulated by this Commission. This option would have merely resurrected the same problems that led to our abandonment of the Computer I approach. That would leave us with no basis for distinguishing between various types of enhanced services. We certainly took no such action in Computer II, and not surprisingly, because there was no record to warrant such action. The Commission went to great lengths so as not to unnecessarily expand the scope of common carrier regulation. Similarly, regulation of some enhanced services, but not others, would entail differentiating among various enhanced services, an option which, as indicated above, we rejected. We concluded that the same regulatory scheme should apply to all enhanced services. Likewise, the Commission could not have intended to adopt a

[21] The Commission's Computer I rules (set forth in Appendix A) were used to determine when an international service was subject to common carrier regulation under Title II. These rules were amended in our *Final Decision* more than two years prior to our *Telenet Decision.*

regulatory plan for international services whereby service vendors would have discretion to tariff or not tariff a given enhanced service. An "optional tariffing" scheme was specifically rejected. *Final Decision* at 496. This leaves only one alternative left, i.e., that Title II regulation would not apply to any enhanced service. Thus, we believe it is clear that the basic/enhanced dichotomy of Computer II was intended to apply to domestic and international services just as the communications/data processing dichotomy of Computer I did.

53. Third, subsequent to release of the *Final Decision* WUI sought clarification of the applicability of the basic/enhanced dichotomy as set forth in Section 64.702 to the international market.[22] We sought to remove any doubt as to its applicability internationally. We specifically stated that "[t]he basic/enhanced dichotomy is applicable to both domestic and international services provided over common carrier facilities." *Reconsideration*, 84 FCC 2d at 53, n. 4. It is hard to envision a more clear, or straight forward statement of its applicability to international services. Moreover, in light of our discussion in the *Final Decision* at paras. 107-113, it was not unreasonable to respond to WUI's request in a single, clear, and definitive statement as we did. In addition, affirmation of the uniform treatment to be applied to all enhanced services was specifically made when we stated that " . . . we have, in a factual context analyzed the characteristics of enhanced services within the framework of our overall statutory mandate and have rejected further classification of different enhanced services for purposes of Title II regulation." *Reconsideration* at 90. No one challenged or sought reconsideration of these unambiguous statements which merely affirmed the fundamental determination made in the *Final Decision.*

54. Finally, petitioners contend that language in the *Final Decision* indicates that the basic/enhanced dichotomy was not intended to apply internationally. The petitioners argue that Section 64.702(a) of the Computer II rules defines enhanced services as those services provided over common carrier facilities used in "interstate" communications. See Appendix C. They contend that if the rules were intended to apply to the international sector, the term "foreign" would have been used. As we noted in our *Telenet Decision*, use of the term "interstate" merely establishes a jurisdictional nexus for the exercise of federal jurisdiction. See *Telenet Decision* at para. 14. It serves to make clear that Section 64.702(a) applies to any service involving common carrier facilities used in interstate communications regardless of whether the end-to-end service is intrastate, interstate or foreign.

[22] Petition for Reconsideration of Western Union International, Inc., filed June 12, 1980, in Docket No. 20828.

55. Acceptance of petitioner's argument that Computer II only applies to "interstate" communications leads to anomalous results. For example, intrastate and international services would be excluded from Computer II with the attendant consequences discussed above. As a practical matter, however, common transmission and computer facilities are used to provide intrastate and interstate enhanced services. Moreover, in many instances U.S. international carriers use the same computer and switching facilities to provide interstate and international services. Thus, the same computer and transmission facilities used in interstate communications can be used in conjunction with intrastate or international communications. Given the fact that use of common carrier facilities is not limited to interstate communications, petitioners nevertheless would have us believe that Computer II only applies to their interstate use. Such an interpretation is clearly incorrect. See discussion *infra.*

56. Petitioners also contend that language in the Computer II *Final Decision* expressly excluded application of the basic/enhanced dichotomy to international services. See fn. 7, *supra.* We addressed this argument in the *Telenet Decision* and rather than reiterate what already has been stated there, we shall merely affirm our previous determination. See *Telenet Decision* at paras. 18-22. Needless to say, petitioners erroneously contend that this Commission did not apply the basic/enhanced definitional structure to services provided internationally because we deferred consideration as to whether the IRCs should provide enhanced services through a separate subsidiary. The exclusion of enhanced services from regulation under Title II of the Act is a separate and distinct issue from a determination as to how, or under what corporate structure the IRCs provide unregulated enhanced services.

57. We deferred imposition of a separate subsidiary resale structure for enhanced services of the IRCs pending the completion of an inquiry on international resale. *Final Decision* at 489. Less than two weeks after adoption of the Computer II *Final Decision*, we adopted a Notice of Proposed Rulemaking on international resale. *International Resale*, 77 FCC 2d 831 (1980). In that proceeding we indicated that in Computer II "the question of whether or not the IRCs should be required to establish separate subsidiaries in the event they desired to offer enhanced services would be addressed as part of our consideration of the international resale issue." *Id.* at 841. Accordingly, we put this specific issue out for comment. *Id.* as ARINC correctly points out, the question of whether to apply a separate subsidiary requirement could not logically arise unless the Commission had already agreed to differentiate between basic and enhanced international services. (Opposition at pp. 4-5) That this Commission had already determined the regulatory scheme to be applied to international enhanced services is further evidenced by virtue of the fact

that this issue was not set for comment. The fact that the Computer II *Final Decision* applied the basic/enhanced dichotomy to international services can be found in our clear and unambiguous statement that "the requirement for AT&T and GTE to establish separate subsidiaries for enhanced services applies to their overseas as well as domestic services."[23] *International Resale* at 841, n. 19. We believe, it is clear, therefore, that by holding in abeyance a decision as to whether the IRCs should be subject to a separate subsidiary resale structure, the Commission did not negate its determinations that all enhanced services should be subject to the same regulatory scheme and that such services are not common carrier communications services under Title II of the Act.[24]

58. Even assuming, arguendo, that we reserved application of *Computer II* internationally, we could make that determination in the adjudicatory context of the underlying *Telenet* decision since it is clear that we received adequate comments on that issue in *Telenet.*

B. Impact of Decision

59. Arguments are advanced that extension of Computer II to the international arena results in adverse consequences of cosmic proportions. General allegations are made to the effect that (a) the Commission has unilaterally injected a vast new regulatory scheme into the international arena without an assessment of its implications, (b) the Commission has prejudged its *International Resale* proceeding by authorizing unlimited international resale, (c) abandonment of jurisdiction over international enhanced services could lead to unfettered entry by foreign entities in the provision of end-to-end international services, anticompetitive conduct through whipsawing or exclusive operation arrangements — actions which this Commission would have no jurisdiction to control, and (d) foreign administrations may react adversely and take action to abolish private line services. Upon examination it is evident that such allegations are unfounded based on our action in Computer II.

60. We first address the allegation that this Commission has taken improper unilateral action in applying the Computer II basic/enhanced dichotomy to international services without an assessment of the implications of such action. Moreover, it is argued that the basic/enhanced

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[23] This requirement was subsequently removed for GTE.

[24] Similarly, we rejected petitioners' argument that the decision to deal with detariffing of IRC telex terminal equipment in the Second Unbundling Order proceeding demonstrates an intention not to apply Computer II internationally. That decision dealt solely with a particular type of customer premises equipment i.e., IRC telex equipment, not enhanced services. We decided to address IRC telex terminal equipment subsequent to Computer II as a procedural matter because the deregulation of such equipment had been raised in the context of two separate proceedings, i.e., Computer II and Docket No. 21005. See *Telenet Decision* at para. 15.

dichotomy could not apply internationally because the Commission does not have end-to-end jurisdiction over international service. It is clear, however, that such arguments must fall of their own weight when one considers that the action this Commission took in Computer II is analogous to that taken over a decade ago in the *First Computer Inquiry* (Computer I).

61. As indicated in paragraphs 41-42, *supra*, in Computer I a definitional structure was adopted for purposes of determining those services provided over common carrier facilities that would be subject to common carrier regulation under Title II of the Communications Act. See, Section 64.702(a) as set forth in Appendix A. These definitions were used to determine whether a service was primarily communications or primarily data processing. Those offerings found to be primarily data processing services were not subject to common carrier regulation. The Computer I communications/data processing rules applied to all services — domestic and international — and also required the IRCs to provide data processing services through a separate subsidiary. Because application of these rules was becoming increasingly difficult to apply due to advances in computer technology, we set out in Computer II to more clearly delineate the boundary between regulated and nonregulated services. In Computer II we replaced the communications/data processing rules with our basic/enhanced dichotomy and concluded that enhanced services are not common carrier communications services under the Communications Act.

62. Like Computer I, this determination applied to both domestic and international services. Moreover, like Computer I we merely established the point on the continuum where common carrier regulation ceases. Beyond this, the only difference between Computer I and Computer II is that in Computer II we removed from the IRCs the subsidiary requirement to which they were subject by virtue of Computer I. Today the IRCs need not provide enhanced services, including data processing services, through a separate subsidiary.

63. The need to separately identify and address any and all potential international ramifications of this determination is highly questionable when this Commission merely determined how it was going to apply the Communications Act of 1934, as amended, to various services provided over common carrier facilities licensed by this Commission. The ability of this Commission to make independent determinations as to whether various international services are to be regulated under Title II has been evident ever since Computer I.

64. The argument that the Commission can not apply the basic/enhanced dichotomy to international services because it does not have end-to-end jurisdiction is devoid of merit. It is obvious that this Commission has no authority to act in any way that would foreclose foreign

administrations from exercising their sovereign rights with respect to the regulation of telecommunications facilities in their own countries. Computer II does not, and cannot, dictate how foreign administrations regulate telecommunications facilities and services subject to their jurisdiction. At the same time, however, a decision as to whether we regulate under Title II certain services provided over common carrier facilities licensed by this Commission rests solely with this Commission. As in Computer I, Computer II can properly and legitimately apply only to those entities operating in the U.S. that provide basic or enhanced services over common carrier communications facilities licensed by this Commission.

65. Thus, if there is an international service that, viewed on an end-to-end basis is enhanced, the location of the enhancement is relevant to the determination under Computer II whether a United States entity is providing an enhanced service. If the enhancement occurs in the facilities of a foreign administration or carrier, and a United States entity provides only basic communications to the point of interconnection of its facilities with those of the foreign administration or carrier, the service of the United States entity would remain basic. Conversely, if the enhancement occurs in the facilities of the United States entity, it would be offering an enhanced service. Finally, consistent with our decision in Pacific Bell Telephone Co. et al., File No. ENF-84-15 et al., FCC 84-561, released November 28, 1984, if the United States entity generates an intermediate internetworking interface for interconnection of its basic services with the services of the foreign entity, that interface will be treated as part of the basic service provided by the United States entity if it is otherwise basic, and if an appropriate waiver has been secured.

66. Second, petitioners argue that the Commission prejudged the *International Resale* proceeding by authorizing unrestricted international resale and acted inconsistent with CCITT Recommendations which restrict resale of private line facilities. These contentions are simply incorrect. This Commission did not (a) prejudge the outcome of our *International Resale* docket, (b) authorize unlimited resale, or (c) act inconsistent with CCITT Recommendations.

67. In *International Resale* we are examining various provisions currently embodied in IRC tariffs which govern third party use of their facilities. In general, these provisions restrict resale of their facilities. Whether or not these restrictions on third party use should be maintained is a determination to be made in that proceeding. Computer II did not remove or otherwise modify these tariff restrictions and there is no language in any of our Computer II decisions to the contrary. These tariff provisions governing third party use are currently in effect and govern how IRC facilities are utilized.

68. WUI states that "[c]learly the Commission has authorized resale internationally, of enhanced services." (Petition at 12). WUI would have us believe that because we did not impose common carrier regulation over enhanced services, we authorized international resale. Suffice it to say that application of the Computer II basic/enhanced dichotomy to international services merely results in any enhanced services being outside the scope of Title II regulation. How common carrier facilities may be utilized and whether a particular basic or enhanced service may be provided by a given vendor is governed by a carrier's tariff which sets forth the terms and conditions under which the common carrier facilities or services can be utilized. Enhanced service vendors, therefore, can only use a common carrier service in a fashion consistent with the carrier's tariff. Likewise, where tariff provisions restrict how these transmission facilities may be utilized, such provisions restrict how a service may be provided regardless if the service is basic or enhanced.

69. Where, as in the case of the IRCs, there are tariff restrictions governing third party use, these provisions govern how particular services can be utilized by any third party, including enhanced service vendors, until such time as these provisions are removed by action of the carrier or this Commission. These third party use restrictions apply equally to carriers and non-carriers. Therefore, other carriers and enhanced service vendors are treated similarly under a given carrier's restrictions on third party use provisions. At the same time, there are carriers offering international services, the tariffs for which contain no restrictions on resale. Accordingly, whatever resale is permitted or precluded is not a function of our determination in Computer II, but is a result of the tariff provisions governing the use of a given carrier's common carrier facilities. Clearly, we did not require in Computer II the removal of the IRCs' tariff restrictions governing third party use. As such, it is evident that we did not authorize international resale.

70. WUI contends that there is an inconsistency between language on *Reconsideration*, 84 FCC 2d 74, n. 19, and our *Telenet Decision* at paragraph 19 where we indicate that the IRCs may have a competitive advantage in the use of their own facilities because an IRC is not subject to its own third party use restrictions. We fail to see the inconsistency. The language on *Reconsideration* states that carriers that are not subject to the separate subsidiary requirement "must obtain transmission capacity pursuant to the terms and conditions embodied in their tariff" when using their own facilities for the provision of enhanced services. Thus, if an IRC seeks to provide enhanced services utilizing basic services in a manner inconsistent with its tariffs, we would have serious questions of lawfulness under the Act and Computer II.

71. Third, various petitioners contend that abandonment of jurisdiction over international enhanced services could lead to unfettered entry by foreign entities in the provision of end-to-end international services. By virtue of controlling end-to-end service, it is argued the foreign entities could engage in anticompetitive conduct and thwart the Commission's competitive policies. Such a contention is speculative and falsely premised. While the Commission does not have Title II jurisdiction over enhanced services *per se*, it does have its full panopoly of statutory authority over the licensing and use of the common carrier facilities which constitute an essential component and basic building block in the provision of enhanced services. See *Final Decision* at 420, 430; *Reconsideration* at 90. In addition, we have residual authority under Title I of the Act to ensure the full effectuation of our statutory mandate. In those instances where specific abuses can be identified with respect to the provision of enhanced services that conflict with or undermine the Commission's policies, this Commission has ancilliary authority to remedy the specific problem. See *CCIA v. FCC*, 693 F.2d at 211-13. To suggest that this Commission lacks authority to adequately address potential problems in this area is simply erroneous.

72. Computer II merely establishes that enhanced services are not subject to a common carrier scheme of regulation. As with any decision, this Commission intends to ensure that our competitive policies are not undermined. So long as this Commission has jurisdiction over domestic transmission facilities and the U.S. segment of international facilities, we maintain the ability to ensure that entities operating in the U.S. do so in a manner consistent with our policies. The Commission stands ready to ensure that our policies are not circumvented by foreign entities through their use of U.S. controlled transmission facilities in an anticompetitive manner.

73. Fourth, concern is expressed regarding potential adverse reaction to the Commission's Computer II decision by foreign administrations. Reference is made to various correspondences on the part of foreign administrations which WUI appended to its Petition for Reconsideration. See footnote 10, *supra.* These correspondences occurred in response to a telex sent by WUI soliciting their comments on Computer II. (WUI letter is attached as Appendix D.) Varying degrees of concern are expressed with respect to our Computer II decision.

74. In general, the thrust of these concerns appears to be based on a misunderstanding as to the effect of our action. As pointed out, our action did not authorize international resale. Concern is also expressed as to possible steps foreign administrations might take if they believe this Commission has ordered unrestricted resale of private line facilities in contravention of CCITT recommendations. In this regard, any adverse

action on the part of foreign administrations is, of course, based on a false premise and hence is wholly unwarranted. We agree, however, that steps must be taken to correct any misunderstanding that exists of U.S. policy to foreign administrations. This Commission will endeavor to take whatever steps are appropriate to apprise foreign administrations of the limited effect of Computer II. It is important that foreign administrations fully understand that this Commission took no action in Computer II that contravenes or undermines international agreements or recommendations governing resale of private line facilities. Moreover, this Commission took no action to alter existing tariff restrictions governing third party use of international services. And, finally, this Commission took no action to limit the provision or deployment of enhanced services abroad, see para. 65, *supra.*

75. We believe that maintaining effective communication and understanding between the U.S. government and foreign administrations can avoid adverse measures such as those feared by ADAPSO. However, we see no basis for delaying implementation of policies, such as our Computer II decision, that do not adversely affect foreign correspondents. We believe that the key to avoiding misunderstanding is the accurate articulation of our policy to foreign administrations. The Commission expects to contribute to this effort in its dealings with representatives of foreign entities.

76. It is also suggested that foreign administrations that do not agree with our regulatory policies may not want to enter into operating agreements with unregulated entities. Our policy in favor of multiple providers of international services differs from the traditional regulatory philosophy of many foreign administrations that operate on a monopoly basis. These differences have been in existence long before our Computer II decision and often have resulted in U.S. carriers' failure to conclude operating agreements for even regulated services. Thus, while we recognize that foreign administrations may have valid reasons for structuring their communications industries in a manner that differs from ours, we nevertheless are charged with formulating communications policies that best meet our own domestic needs and interests.

C. Relationship Between the RCCA and Computer II

77. WUI contends that application of the basic/enhanced distinction to the international arena is inconsistent with the goals of the RCCA. WUI questions the Commission's ability to force interconnection between carriers and enhanced service providers since the RCCA's interconnection obligations only apply to common carrier services. Issues involving interconnection obligations under the RCCA are being addressed in a

separate proceeding.[25] Suffice it to say that Congress in adopting the RCCA gave this Commission specific authority to prescribe where necessary appropriate interconnection arrangements for those services subject to the RCCA. In our *Memorandum Opinion and Interim Order*, we addressed the issue of how certain enhanced services would be treated transitionally under the RCCA. Since the RCCA was enacted subsequent to adoption of our Computer II rules, we concluded that certain otherwise unregulated enhanced services were intended to be encompassed by the special regulatory plan of the RCCA. Accordingly, we found "no legal impediment to the use of tariff mechanisms to address interconnection within the scope of the RCCA, notwithstanding the more general principles under Section 64.702(a) of our rules." 93 FCC 2d at 177. More recently, we removed this special transitional tariff regulation.[26] Thus, it is clear that the RCCA does not preclude this Commission from implementing our Computer II determination that the basic/enhanced dichotomy applies to services provided internationally.

D. Request for Stay

78. RCA and ADAPSO request that we stay our decision. The criteria that have to be met to justify the issuance of a stay are found in *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). According to the Court, the four part test is: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?.... (2) Has the petitioner shown that without such relief, it will be irreparably injured?.... (3) Would the issuance of a stay substantially harm other parties interested in the proceedings?.... (4) Where lies the public interest? In *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977), the Court modified the test enunciated in *Virginia Jobbers* so that when the second, third and fourth factors are met, a tribunal may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. Based on our analysis of the issues in this case, we conclude that a stay is not justified under either the *Virginia Jobbers* or the *Holiday Tours* tests.

79. RCA asserts that it has a substantial likelihood of success on the merits because it was not given adequate notice of the Commission's intention to apply Computer II rules to the international sector. There is no merit to RCA's contention. In the course of this discussion we have already established that RCA and other interested parties were given

[25] See Interconnection Arrangements Between and Among the Domestic and International Record Carriers, CC Docket 82-122, Notice of Proposed Rulemaking, released March 4, 1982, Interim Order, 89 FCC 2d 988 (1982), Tentative Decision, released June 11, 1982, and Memorandum Opinion and Interim Order, 93 FCC 2d 159 (1983).

[26] Interconnection Arrangements Between and Among the Domestic and International Carriers, 99 FCC 2d 146, FCC 84-523 (released November 15, 1984).

clear notice of the potential applicability of Computer II rules to the international arena in the *Tentative Decision* and that the Commission's *Final Decision* involved this matter. Therefore, we find no basis to conclude that RCA is either likely to succeed on the merits or that it has made a substantial case on the merits.

80. RCA also contends that if a stay is denied it would suffer irreparable harm. While RCA acknowledges that the extent of injury is difficult to quantify, it asserts that some portion of almost all of its overseas services and customers could be exposed to diversion. RCA also cites the substantial administrative costs of complying with the Computer II decision and potential difficulties with overseas correspondents. These allegations standing along clearly are insufficient to establish irreparable harm. As the Court in *Virginia Jobbers* noted:

> "The key consideration is whether the injury would be irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." 259 F.2d at 925.

When viewed in this context, RCA's allegations of irreparable injury are highly speculative and unsupported. For example, RCA does not demonstrate why diversion of its customers and services must necessarily follow from the deregulation of enhanced services internationally. Even assuming RCA had made such a showing, it still would have to establish the irreparable nature of the injury. It appears that RCA's allegations in this regard are based on nothing more than its fear of additional competition. Similarly, assuming that potential problems with overseas correspondents will result, RCA has not demonstrated that such problems will be insurmountable. Also, it is clear under the *Virginia Jobbers* decision that the prospect of additional administrative costs is insufficient to establish irreparable injury.

81. Similarly, ADAPSO has not demonstrated why the elimination of flat-rate private line service will follow from the deregulation of enhanced services internationally. First, ADAPSO ignores the fact that the *Telenet Decision* in no way affects the sovereign rights of foreign administrations to choose to deal or not deal with entities as they please. In this connection the *Authorized User II* decision will not in itself provide the means for enhanced service providers to operate internationally. Although non-carrier entities may obtain facilities directly from Comsat, those entities would be responsible for obtaining operating agreements with the appropriate foreign administrations. It is not clear given these limitations how enhanced service providers would operate without the consent of foreign administrations. With the foreign administrations' ability to control the entry of enhanced service providers into their respective markets, it is not clear that the elimination of flat-rate private line service would be imminent. In our April, 1984 *First Report on ISDN*, ____

FCC 2d _____, FCC 84-131 (released April 2, 1984), we stressed the importance of international private line service to the interests of the United States, and we have every reason to anticipate that other administrations will be sensitive to our expressed needs. More generally, we have continually stressed the need for maintaining effective communication and understanding between the U.S. government and foreign administrations in order to avoid adverse measures such as those feared by ADAPSO. Clearly, ADAPSO has not demonstrated that without a stay it will suffer injury or that it would be irreparable.

82. RCA also contends that neither the public nor any single party will be injured by maintaining the status quo. RCA asserts that the interest of the using public will be advanced by a stay since the public will not be deprived of service. However, RCA has not provided any evidence to support this conclusion, and the record in this proceeding is otherwise devoid of any such evidence. In fact, for the last two and one half years entities have been structuring their services premised on Computer II. Dislocations in the marketplace would inevitably result from the loss of certainty as to the applicability of common carrier regulation to specific services.

83. Finally, RCA maintains that the public interest would be served by a stay since the public will not be deprived of service if the implementation of Computer II internationally is deferred. This contention is also unsupported by RCA and otherwise has no basis in the record. We believe the contrary to be true. In Computer II the Commission made a generic finding that all enhanced services are outside the scope of Title II regulation. That finding has been expressly affirmed in all respects. *CCIA v. FCC*, *supra.* Therefore, a stay in this instance would have the undesirable effect of staying the Computer II decision which the Court of Appeals for the District of Columbia recently affirmed. In view of these considerations, RCA's and ADAPSO's requests for a stay are denied.

E. ADAPSO Petition for Rulemaking

84. Although couched in terms of establishing a procedure for the orderly implementation of Computer II internationally, ADAPSO's petition actually challenges the basis for the application of Computer II internationally. In so doing, ADAPSO for the most part raises the same arguments or variations of those arguments made in connection with the various petitions for reconsideration of the *Telenet Decision.* In addition, ADAPSO raises some issues not previously raised in the subject petitions for reconsideration.

85. We have already considered in the context of this order the following arguments also raised in the ADAPSO petition: (1) adequacy of the record to support the application of Computer II internationally; (2) the impact of the *Telenet Decision* on foreign administrations and U.S.

enhanced service providers; (3) potential adverse foreign reaction; (4) the Commission's alleged lack of jurisdiction to control anticompetitive conduct such as exclusive arrangements by foreign-owned enhanced service providers operating in the U.S. and the potential for whipsawing; and (5) the need to stay the effectiveness of the *Telenet Decision.* We need not repeat our discussion of these arguments.

86. ADAPSO has, however, expanded some of these arguments to include questions not previously raised in the petitions for reconsideration. For example, ADAPSO contends that adequate competitive safeguards do not exist with respect to AT&T, Comsat and the IRCs. There is clearly no support for ADAPSO's contention. These questions have been exhaustively considered by the Commission. It was as a result of the very concerns raised by ADAPSO in its petition that the Commission in the Computer II *Final Decision* determined that enhanced services should be provided by AT&T only through a separate subsidiary. There is also no merit to the argument that since Computer II was primarily a domestic policy that we need to reexamine whether there is a need for structural safeguards with respect to the offering of international enhanced services. First, we have made clear in the context of this order that the generic finding that enhanced services would not be subject to Title II jurisdiction applies to domestic and international services. Second, the imposition of a separate subsidiary requirement on AT&T was done with full contemplation that its separate subsidiary would provide enhanced services internationally. For example, in the *International Resale* proceeding the Commission, in discussing whether the IRCs should be subject to a separate subsidiary requirement, stated:

> We emphasize that the requirement for AT&T and GTE to establish separate subsidiaries for enhanced services applies to their overseas as well as domestic services.

77 FCC 2d at 841, n. 19.

87. Similarly, this Commission has thoroughly examined the consequences of Comsat's involvement in non-INTELSAT/INMARSAT services. The Commission's concern with Comsat's participation in non-jurisdictional activities can be traced to the *Comsat Study*[27] where the Commission noted that Comsat's involvement in such activities might create conflicts in the discharge of its statutory obligations. However, the Commission noted that the public interest would be served by allowing Comsat to participate in non-INTELSAT/INMARSAT activities so long as such participation would not be inconsistent with its statutory obligations. This determination was affirmed in *Comsat Structure*, with the Commission adding Comsat's participation in present and future non-INTELSAT/

[27] Comsat Study, 77 FCC 2d 564 (1980).

INMARSAT activities be through its subsidiaries only.[28] In *Authorized User II* the Commission determined that the provision of basic transmission capacity is an "INTELSAT activity" which has to be offered through Comsat's World System Divisions.[29] The provision of any other service, including end-to-end service, was defined as a non-INTELSAT activity and required to be offered through a subsidiary. With respect to enhanced services, the Commission in *Authorized User II* specifically stated that should Comsat elect to offer enhanced services, it must offer them through a corporate affiliate separate from its INTELSAT/INMARSAT operations.[30] This subsidiary must obtain transmission capacity pursuant to tariff just as any other enhanced service provider would. This approach is totally consistent with Computer II. Any lack of symmetry with respect to Comsat's structure vis-a-vis AT&T's for enhanced services does not negate the fact that competitive considerations resulting from Comsat's provision of non-statutory services have been carefully scrutinized by the Commission.

88. As we have indicated herein, the Commission has not imposed a separate subsidiary requirement on the IRCs for their international enhanced services. In the Computer II *Final Decision*, the Commission deferred consideration of this issue pending the outcome of an international resale proceeding. However, the pendency of this issue should not delay implementation of Computer II policies internationally. The Commission noted in the *Telenet Decision* that pending the outcome of the *International Resale* proceeding, the IRCs may offer basic and enhanced services over their own facilities.

89. In view of these Commission actions, it is clear that the Commission has carefully considered the competitive implications resulting from the provision of enhanced services internationally by AT&T, Comsat and the IRCs and has imposed competitive safeguards where deemed necessary. In view of this background, we see no need for consideration of additional structural safeguards.

90. ADAPSO has also stressed the need for enhanced service providers to have access to underlying transmission facilities. In this regard, ADAPSO contends that the Commission has never made it clear what is meant by "own" and "ownership" of facilities. ADAPSO argues that some clarification is necessary for Computer II purposes since a facilities-owning carrier must acquire transmission capacity for enhanced services pursuant to tariff. ADAPSO also questions whether the third party use restrictions contained in the IRCs' tariffs are applicable to the IRCs

[28] Comsat Structure, 90 FCC 2d 1159 (1982).

[29] See fn. 9, *supra.*

[30] Authorized User II, 90 FCC 2d at 1421, n. 25.

directly or their subsidiaries providing enhanced services in the same manner as they apply to other enhanced service providers.

91. With respect to the first of these contentions, there is no basis for any confusion with respect to the concepts of lease ownership and IRUs. Under our *Computer II* policy these concepts have the same, ordinary meanings as expressed in prior Commission decisions. For example, Comsat provides satellite circuits on a lease basis to other carriers. Although *Authorized User II* held that Comsat could provide such circuits to non-carrier entities, it did not alter the fact that such entities lease these circuits rather than own them. On the other hand, IRUs have traditionally been viewed as a surrogate mechanism for ownership.

92. Turning to ADAPSO's second contention, we note that the *Reconsideration* order states that carriers that are not subject to the separate subsidiary requirement must obtain transmission capacity pursuant to the terms and conditions embodied in their tariffs when using their own facilities for the provision of enhanced services. Thus an IRC can obtain transmission capacity pursuant to tariff and still not be in violation of third party use restrictions. See paragraph 70 *supra.*

93. As an adjunct to the issue of U.S. enhanced service providers potentially not being able to obtain operating agreements, ADAPSO proposes the initiation of proceeding to confer RPOA status on those U.S. enhanced service providers who wish to provide what is viewed by foreign administrations as "telecommunications." ADAPSO's proposal for conferring RPOA status is primarily related to implementation of Computer II policies internationally and is the subject of a separate proceeding.[31] In any event, we find that this issue is not a basis to delay the applicability of Computer II to services provided internationally.

III. Conclusion

94. The arguments raised here to reverse the Commission's decisions applying Computer II internationally have become time-worn. The Commission first gave notice that it was considering the applicability of Computer II internationally in its *Tentative Decision* five years ago. In its *Final Decision* the Commission set forth a basic/enhanced dichotomy which expressly applied to all services. The Commission has affirmed this principle in two subsequent decisions. We have emphasized that a generic finding was made in the Computer II *Final Decision* that enhanced services are outside the scope of Title II regulation. That finding applied to all enhanced services, not just those provided domestically.

[31] See International Communications Policies Governing Designation of Recognized Private Operating Agencies, Grants of IRUs in International Facilities and Assignment of Data Network Identification Codes, Notice of Inquiry, CC Docket No. 83-1230, 95 FCC 2d 627 (1983).

95. We have rejected arguments that the record evidenced an intention to defer application of Computer II internationally and that application of Computer II internationally prejudged the *International Resale* proceeding. Petitioners now raise additional speculative scenarios as to the alleged results of applying Computer II internationally and allegations that application of Computer II internationally undermines the RCCA. None of the arguments raised by the petitioners warrants a reversal of our Computer II or *Telenet* decisions.

96. We are aware that there may be apprehension on the part of foreign administrations. This Commission intends to make every effort to clarify any misunderstanding that may exist. We are confident that with a proper understanding of our Computer II decision the concerns of foreign administrations and users groups in this country will be ameliorated.

97. We note that by letter dated October 21, 1982, the Chief, Common Carrier Bureau deferred the date by which international carriers are required to file the requisite tariff modifications, if any, necessary to conform their services to Computer II until the Commission acted on the instant petitions for reconsideration. Having acted on the petitions, we shall require international carriers to file within 30 days of the release of this decision any tariff modifications required to reflect the non-tariffing of enhanced services. We shall require that such tariffs be filed effective upon 45 days notice.[32] The Chief, Common Carrier Bureau may require that the effective date be extended for an additional period if the circumstances so warrant. Likewise, if the circumstances warrant, the Bureau Chief may allow a carrier to advance the effective date of such tariff modifications.[33]

IV. Ordering Clauses

98. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration filed by Western Union International, Inc., RCA Global Communications, Inc., the Association of Data Processing Organizations and International Communications Association ARE DENIED.

99. IT IS FURTHER ORDERED, that RCA's and ADAPSO's request for a stay ARE DENIED.

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[32] In an order released November 15, 1984, we required record carriers to file revisions to detariff enhanced record services (both domestic and international) by February 1, 1985, to be effective on 35 days notice. See Interconnection Arrangements Between and Among the Domestic and International Record Carriers, CC Docket No. 82-122, FCC 84-523, released November 15, 1984. Since the international enhanced record services covered in the November 15, 1984 order are a subset of all international enhanced services, those services should be detariffed in accordance with the timetable specified herein.

[33] A carrier may maintain tariffs for international basic communications even if its facilities also support enhanced services, provided that the enhanced services are not included in such tariffs.

100. IT IS FURTHER ORDERED, that ADAPSO's petition for Rulemaking IS HEREBY DISMISSED.

101. IT IS FURTHER ORDERED, that carriers shall conform their tariffs for international services consistent with our Computer II determinations as set forth in paragraph 97, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A: Rules adopted in First Computer Inquiry

SUBPART G—PARTICIPATION IN DATA PROCESSING BY COMMUNICATIONS COMMON CARRIERS

§64.702 Furnishing of data processing services.

(a) For the purpose of this subpart—

(1) "Data processing" is the use of a computer for the processing of information as distinguished from circuit or message-switching. "Processing" involves the use of the computer for operations which include, *inter alia*, the functions of storing, retrieving, sorting, merging and calculating data, according to programed instructions.

(2) "Message-switching" is the computer-controlled transmission of messages, between two or more points, via communications facilities, wherein the content of the message remains unaltered.

(3) "Local Data Processing Service" is an offering of data processing wherein communications facilities are not involved in serving the customer.

(4) "Remote Access Data Processing Service" is an offering of data processing wherein communications facilities, linking a central computer to remote customer terminals, provide a vehicle for the transmission of data between such computer and customer terminals.

(5) "Hybrid Service" is an offering of service which combines Remote Access data processing and message-switching to form a single integrated service.

(i) Hybrid Data Processing Service is a hybrid service offering wherein the message-switching capability is incidental to the data processing function or purpose.

(ii) Hybrid Communication Service is a hybrid service offering wherein the data processing capability is incidental to the message-switching function or purpose.

(b) Except as provided herein, no common carrier subject, in whole or in part, to the Communications Act shall engage directly or indirectly in furnishing data processing service to others except as expressly provided in paragraph (c) of this section. This prohibition shall apply to all communications common carriers, including section 2(b)(2) carriers, where any carrier itself has annual operating revenues exceeding $1 million or any such carrier is directly or indirectly controlled by, or is under common control with, another carrier or carriers, and the combined annual revenues of all such carriers exceed $1 million.

(c) Except for Companies of the Bell System, common carriers may, subject to other provisions of law, have a controlling or lesser interest in, or be under common control with, a separate corporate entity that furnished data processing service to others provided the following conditions are met:

(1) Each such separate corporation must maintain its own books of account, have separate officers, utilize separate operating personnel, and utilize computing equipment and facilities separate from those of the carrier for its data processing service offerings.

(2) Each such common carrier shall file with the Commission a complete statement of the terms and conditions of every written or oral contract, agreement or other arrangement entered into between such carrier and any such separate corporation within 30 days after the contract, agreement, or other arrangement is made.

(3) No such common carrier subject to the prohibition of paragraph (b) of this section shall engage in the sale or promotion of data processing services on behalf of any such separate corporation.

(d) No common carrier subject in whole or in part to the Communications Act of 1934, as amended, shall sell, lease, or otherwise make available to any other entity any capacity or computer system component on its computer system or systems which that carrier uses in any way for the provision of its common carrier communications services.

(e) An common carrier intending to file a tariff respecting a service offering which it considers to be a hybrid communication service shall, at least 90 days prior to the intended effective date of such tariff, submit to the Commission a complete description of the service, along with a statement of its reasons for concluding that the proposed service is a hybrid communication service. Whereupon:

(1) If, at the end of 60 days after such notice is filed with the Commission, the Commission has not advised the carrier of contrary findings respecting its proposed hybrid communication service, the carrier may proceed to file appropriate tariffs in accordance with applicable provisions of the Commission's rules; or

(2) If the carrier is advised within 60 days after the Commission's receipt of notice that the Commission has tentatively concluded that the proposed offering is not a hybrid communication service, the carrier may seek reconsideration of the tentative conclusion, request a hearing on any disputed factual findings or pursue such other remedies as are provided by law.

(f) Before a common carrier may provide its data processing affiliate with communication services and facilities which the latter desires to use for the furnishing of any hybrid data processing service, the carrier shall first submit, directly or through its affiliate, a complete description of the proposed service offering, along with a statement of the reasons for concluding that the service is a hybrid data processing service. The carrier may provide such service unless, within 30 days from the receipt of such notice, the Commission shall have advised the carrier or its affiliate of the Commission's tentative conclusion that the intended service is a communications service. If the carrier and its affiliate disagree therewith, the carrier may seek reconsideration of the tentative conclusion, request a hearing on any disputed factual findings or pursue such other remedies as are provided by law.

(g) No common carrier providing a communication service, hybrid or otherwise, may discontinue such tariffed service until authorization to do so is obtained from the Commission. In seeking authorization to discontinue a service, a carrier must:

(1) Demonstrate that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance. Such demonstration shall include whether and to what extent there is a demand for the communication service, the entity or entities which would continue to provide such service if discontinued by the carrier, and the comments of existing customers on any proposed modification of the service and its offering by a carrier's data processing affiliate;

(2) Demonstrate the nature and extent of the public demand for any modified service proposed to be rendered as a hybrid data processing service; and

(3) Submit full information as to the disposition of any of the facilities used in the communication service, including relevant financial arrangements, the accounting to be performed by the carrier with respect to the transaction and the treatment of any losses sustained in the provision of the communication service.

APPENDIX B: Rules Proposed in Computer II Tentative Decision

1. Section 64.702, Subpart G, is amended to read as follows:

Subpart G Participation in Computer Processing By Communications Common Carriers

64.702 Furnishings of computer processing services:

(a) For the purpose of this subpart:

(1) "Computer Processing" is the use of a computer for processing information where the output information constitutes a programmed response to input information. The term "computer" comprehends, *inter alia:* general purpose stored program processors, general and special purpose mini-computers and micro-processors. "Processing" entails the use of a computer for operations upon data which include, *inter alia:* arithmetic and logical operations, storage, retrieval, and transfer.

(2) "Data processing" is the processing of input information for the purpose of providing additional, different or restructured information.

(3) A "data processing service" is the offering for hire of computer processing capabilities for the purpose of: (a) transforming or altering for the subscriber of the service the information content or meaning of information provided by the subscriber; or (b) maintaining and managing, or providing a data information bank or information retrieval service whereby information may be selectively retrieved by or for a subscriber to the service; or (c) monitoring or controlling an on-going non-communications process or event.

(4) "Hybrid Data Processing Service" is an offering of a data processing service utilizing common carrier communications facilities for the transmission of data between the remote computers and customer terminals.

(b) Communications common carriers may utilize computer processing, including data processing, in the provision of a communications service; provided, however, that any data processing performed by a carrier as part of a tariffed service must directly relate to and be for the purpose of providing a communication service, or for meeting the carrier's own internal operational and financial management needs.

(c) For the purpose of this subpart carrier services are divided into three categories—"voice", "basic non-voice", and "enhanced non-voice" services.

(1) A "voice" service is the electronic transmission of the human voice such that one human being can orally converse with another human being.

(2) A "basic non-voice" service is the transmission of subscriber inputted information or data where the carrier: a) electronically converts originating messages to signals which are compatible with a transmission medium, b) routes these signals through the network to the appropriate destination, c) maintains signal integrity in the presence of noise and other impairments to transmission, d) corrects transmission errors, and e) converts the electrical signals to useable form at the destination.

(3) An "enhanced non-voice" service is any non-voice service which is more than a "basic non-voice" service where computer processing applications are used to act on the form, content, code, protocol, etc., of the inputted information.

(d) With respect to the categories of service listed in paragraph (c), Communications common carriers owning transmission facilities which are used in the provision of interstate communications services may directly provide only "voice" and "basic non-voice" services. Such carriers may provide "enhanced non-voice" services only through a separate corporate entity on a resale basis. The computer facilities of the underlying carrier which are used in the interstate provision of "voice" and "basic non-voice" services may not be used for those computer processing applications associated with "enhanced non-voice" services and which

would render the service more than a "basic non-voice" service. All "enhanced non-voice" services must be provided by carriers on a resale basis. Except as to International Record Carriers, these conditions all apply to all communications common carriers, including section 2(b)(2) carriers, where any carrier itself has operating revenues exceeding $1 million or any such carrier is directly or indirectly controlled by, or under common control with, another carrier or carriers, and the combined annual revenues of all such carriers exceed $1 million.

(e) An International Record Carrier (IRC) shall not engage directly or indirectly in furnishing data processing services to others except as expressly provided in paragraph (f) of this section.

(f) An IRC may, subject to other provisions of law, have a controlling or lesser interest in, or be under common control with, a separate corporate entity that furnishes data processing services to others provided the following conditions are met:

(1) Each such separate corporation maintains its own books of account, have separate officers, utilize separate operating personnel, and utilize computing equipment and facilities separate from those of the carrier.

(2) The IRC files with the Commission a complete statement of the arms and conditions of every written or oral contract, agreement or other arrangement entered into between such carrier and any separate corporation within 30 days after the contract, agreement, or other arrangement is made.

(3) The IRC does not engage in the sale or promotion of data processing services on behalf of any such separate corporation, or sell, lease, or otherwise make available to any other entity any capacity or computer system component on its computer system or systems which are used in any way for the provision of its common carrier communications services.

(g) An underlying carrier providing "voice" or "basic non-voice" services may only offer customer premises equipment which performs more than a basic media conversion function through a separate resale or other subsidiary.

APPENDIX C: Rules adopted in Computer II Final Decision

Subpart G—Furnishing of Enhanced Services and Customer-Premises Equipment by Communications Common Carriers

§61.702 Furnishing of enhanced services and customer-premises equipment.

(a) For the purpose of this subpart, the term "enhanced service" shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act.

(b) Communications common carriers subject, in whole or in part, to the Communications Act may directly provide enhanced services and customer-premises equipment; provided, however, that the Commission may prohibit any such common carrier from engaging directly or indirectly in furnishing enhanced services or customer-premises equipment to others except as provided for in paragraph (c) of this section, or as otherwise authorized by the Commission.

(c) A communications common carrier prohibited by the Commission pursuant to paragraph (b) of this section from engaging in the furnishing of enhanced services or customer-premises equipment may, subject to other provisions of law, have a controlling or lesser interest in, or be under common control with, a separate corporate entity that furnishes enhanced services or customer-premises equipment to others provided the following conditions are met:

(1) Each such separate corporation shall obtain all transmission facilities necessary for the provision of enhanced services pursuant to tariff, and may not own any network or local distribution transmission facilities or equipment.

(2) Each such separate corporation shall operate independently in the furnishing of enhanced services and customer-premises equipment. It shall maintain its own books of account, have separate officers, utilize separate operating, marketing, installation, and maintenance personnel, and utilize separate computer facilities in the provision of enhanced services.

(3) Each such separate corporation which provides customer-premises equipment or enhanced services shall deal with any affiliated manufacturing entity only on an arm's length basis.

(4) Any research or development performed on a joint or separate basis for the subsidiary must be done on a compensatory basis. Except for generic software within equipment, manufactured by an affiliate, that is sold "off the shelf" to any interested purchaser, the separate corporation must develop its own software, or contract with non-affiliated vendors.

(5) All transactions between the separate corporation and the carrier or its affiliates which involve the transfer, either direct or by accounting or other record entries, of money, personnel, resources, other assets or anything of value, shall be reduced to writing. A copy of any contract, agreement, or other arrangement entered into between such entries shall be filed with the Commission within 30 days after the contract, agreement, or other arrangement is made. This provision shall not apply to any transaction governed by the provision of an effective state or federal tariff.

(d) A carrier subject to the proscription set forth in paragraph (c) of this section:

(1) Shall not engage in the sale or promotion of enhanced services or customer-premises equipment, on behalf of the separate corporation, or sell, lease or otherwise make available to the separate corporation any capacity or computer system component on its computer system or systems which are used in any way for the provision of its common carrier communications services. (This does not apply to communications services offered the separate subsidiary pursuant to tariff);

(2) Shall disclose to the public all information relating to network design and technical standards and information affecting changes to the telecommunications network which would affect either intercarrier interconnection or the manner in which customer-premises equipment is attached to the interstate network prior to implementation and with reasonable advance notification. When such information is disclosed to the separate corporation it shall be disclosed and be available to any member of the public on the same terms and conditions;

(3) May not provide to any such separate corporation any customer proprietary information unless such information is available to any member of the public on the same terms and conditions; and

(4) Must obtain Commission approval as to the manner in which the separate corporation is to be capitalized, prior to obtaining any interest in the separate corporation or transferring any assets, and must obtain Commission approval of any modification to a Commission approved capitalization plan.

(e) Except as otherwise ordered by the Commission, after March 1, 1982, the carrier provision of customer-premises equipment used in conjunction with the interstate telecommunications network shall be separate and distinct from provision of common carrier communications services and not offered on a tariffed basis.

APPENDIX D

TO MESSRS: FRANK RISER
J N DELANEY
R LEPOUDRE
F CARDIN
J ESPINOLA
GUILLERMO REY
S BRECKER
R GONZALEZ R.
H SALAHI
J H ROERDEN Y CIA S. A.
R ZURBRIGGER

THE FOLLOWING MESSAGE WAS FORWARDED TO THE ADMINISTRATIONS IN YOUR COUNTRY.

FR: THOMAS A. MICCHI
ASSISTANT VICE PRESIDENT
INTERNATIONAL RELATIONS DEPT.
WESTERN UNION INTERNATIONAL, INC.

ON AUGUST 5, 1982, THE FCC ISSUED AN ORDER CONCERNING 'ENHANCED SERVICES' AND THEIR RESALE AND SHARED USE. OVERRIDING STRONG ARGUMENTS BY WUI AND A STRONG DISSENT BY ONE COMMISSIONER, THE FCC HAS NOW HELD THAT 'ENHANCED SERVICES' (IE, VALUE ADDED SERVICES) MAY BE SHARED AND RESOLD WITHOUT LIMITATION.

WUI IS FEARFUL THAT THIS TREND MIGHT BROADEN THE BOUNDARIES OF ENHANCED SERVICE TO INCLUDE MANY BASIC SERVICES SUCH AS TELEX, MESSAGE TELEPHONE AND LEASED CHANNELS INTO THE ENHANCED SERVICES CATEGORY AND THE PREVIEW OF THIS DECISION.

IN JUNE, 1980, WUI NOTIFIED YOUR ADMINISTRATION OF THE IMPENDING COURSE WHICH THE FCC HAS FOLLOWING, AND RECEIVED YOUR COMMENTS ON THIS ISSUE.

WUI WILL FILE WITH THE FCC A PETITION FOR RECONSIDERATION. IN ORDER TO REINFORCE ITS ARGUMENT THAT THIS DECISION WAS UNILATERALLY MADE WITHOUT CONSULTATION WITH THE VARIOUS PTT'S OR CCITT FORUM, AGAIN WUI WOULD LIKE TO REQUEST YOUR COMMENTS ON THIS DECISION.

WITH YOUR PERMISSION THESE COMMENTS WILL BE APPENDED TO OUR PETITION, WHICH MUST BE FILED BY SEPTEMBER 24TH. IF YOU DO NOT WANT YOUR COMMENTS APPENDED TO OUR PETITION, HE WOULD LIKE TO MENTION THE TOTAL NUMBER OF ADMINISTRATIONS WHICH RESPONDED, AND WE WOULD LIKE, AT LEAST, TO COUNT YOUR RESPONSE IN OUR TOTAL.

IF YOU HAVE NO OBJECTION, WE WOULD APPRECIATE YOUR VIEW BY SEPTEMBER.

SEPARATE STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Reconsideration of Telenet Decision, File Nos. I-T-C-81-274 and I-T-C-81-210; RM-4435 (Computer II - International)

I write separately to emphasize two basic points lest this decision be misunderstood.

First, this decision does not change the *status quo* vis-a-vis foreign administrations, nor indeed could it. This Commission cannot abrogate the sovereign right of any foreign administration to regulate telecommunications facilities and services subject to their jurisdiction however that foreign administration sees fit.[1]

Second, this decision does not resolve or prejudge the long pending *International Resale* proceeding.[2] As pointed out at paragraphs 74-75 of this decision, we are taking no action that contravenes or undermines sovereign perogatives, international agreements or recommendations or existing tariff restrictions governing resale of private line facilities and third party use of international services. It is important that foreign administrations understand fully the scope of our decision, and this Commission is committed to all that may be necessary toward that end.

---

[1] Nor does this decision change the *status quo* vis-a-vis enhanced service providers' relationships with PTTs. Commenters express fear that an enhanced service provider may be unable to get an operating agreement with a PTT because the provider can no longer produce a Section 214 certificate. During the 2½ years since our original decision in this proceeding, Telenet Decision (Computer II - International), 91 FCC 2d 232 (1982), only one such situation was brought to our attention. We responded to that problem by issuing a formal communication to the PTT "certifying" that the provider could, under United States law, furnish the service it was proposing. We will continue to issue similar communications upon request until we address the issue in greater detail in our pending Notice of Inquiry in CC Docket No. 83-1230 (International Communications Policies Governing Designation of Recognized Private Operating Agencies, Grants of IRUs in International Facilities and Assignment of Data Network Identification Codes, 95 FCC 2d 627 (1983)).

[2] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Communications Services (International Resale), CC Docket No. 80-176, 77 FCC 2d 831 (1980).

Character Qualifications, Abuse of Process
Issue, Enlargement of, Denied
License, Renewal of, See also Renewal or Application
Programming Meritorious
Programming Past
Renewal, Applicant v. New Applicant

Commission affirms and modifies Review Board Decision renewing license and denying mutually exclusive applications. Where license held in deferred status, renewal expectancy based on most recent license term after filing of competing applications. No character issue added for alleged abuse of process by employees of co-owned station. —*Intercontinental Radio, Inc.*
BC Docket No. 81-890

FCC 85-108

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Intercontinental Radio, Inc.	BC Docket No. 81-890 File No. BRH-800801WG
For Renewal of License of Station KSOL (FM), San Mateo, California	
Afro-American Communications San Mateo, California	BC Docket No. 81-891 File No. BPH-801103AL
San Mateo Broadcasting Company, Inc. San Mateo, California	BC Docket No. 81-892 File No. BPH-801027AI
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 1985; Released: March 13, 1985

BY THE COMMISSION: CHAIRMAN FOWLER NOT PARTICIPATING; COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT.

1. The Commission has before it: (1) Applications for Review filed September 19, 1984 by San Mateo Broadcasting Company, Inc. (San Mateo) and Afro-American Communications (Afro) and a Contingent Application for Review filed September 19, 1984 by Intercontinental Radio, Inc. (Intercontinental); (2) Oppositions thereto filed November 13, 1984 by San Mateo and Afro; (3) a Contingent Petition to Enlarge Issues filed September 25, 1984 by San Mateo, an Opposition thereto filed October 10 by Intercontinental, and a Reply filed October 22 by San Mateo; and (4) a Motion Requesting that Chairman Mark S. Fowler Recuse Himself from this Proceeding filed February 7, 1985 by San Mateo. These pleadings relate to a Decision by the Review Board (Board) renewing Intercontinental's license to operate Station KSOL(FM), San Mateo, California and denying the mutually exclusive applications of San Mateo and Afro for construction permits.[1]

2. We agree with the Board's result in this case. Except as modified herein, we adopt the Board's Decision in this proceeding. However, a recent Commission action necessitates some modification of the Board's rationale. In *United Broadcasting Company, Inc., (WOOK(FM))*[2] the Commission considered the application of Intercontinental's corporate parent, United Broadcasting Company, Inc. for renewal of its license to operate Station WOOK(FM), Washington, D.C. There, the Commission modified certain aspects of the Board's *WOOK(FM)* Decision which are also germane to the instant proceeding. One of these warrants discussion. Additionally, an interlocutory matter must be disposed of.

3. Because of questions involving misconduct at co-owned stations, the renewal applications of both WOOK(FM) and KSOL(FM) were held in deferred status for an extended period prior to designation for hearing. After designation, completion of hearings, and issuance of Initial Decisions as to which appeals were taken, the Board held that the stations' broadcast records for the entire period (1966-78 for WOOK(FM) and 1968-80 for KSOL(FM)) should be examined to determine whether the stations' performance was deserving of a renewal expectancy. In *WOOK(FM)*, however, the Commission held on appeal that the licensee did not have notice that it would have to retain evidence of its performance for the entire period, since competing applications were not filed until late in the deferral period. The Commission noted that competing applicants could have filed against the licensee during the period of deferred status whenever the licensee filed its supplemental renewal applications. Because the substantiality of a licensee's performance becomes relevant only if a competing applicant has filed, the Commission reasoned that the licensee did not have notice that it would have to retain evidence for

[1] *Intercontinental Radio, Inc.*, 56 RR 2d 903 (Rev. Bd. 1984).

[2] FCC 84-639, released January 14, 1985.

license terms in which no competing applicants filed. In the absence of notice, the Commission concluded that it would not require the licensee to document and demonstrate the substantiality of its performance for the entire period of deferred status to justify a renewal expectancy. The Commission ruled that only the license term immediately preceding the filing of competing applications need be examined for that purpose.[3]

4. In this case, the Board found that KSOL(FM)'s performance for the entire 1968-80 period warranted a renewal expectancy, notwithstanding questions about its performance prior to 1977. The Board also specifically found that KSOL's 1977-80 record was substantial. We believe that, as was the case in *WOOK(FM)*, since no competing applications were filed prior to the most recent license term, there is no reason to require Intercontinental to have retained documentation of its earlier performance. Accordingly, we will not hold Intercontinental accountable for any questions concerning the adequacy of the pre-1977 programming record. In light of our determination, the Board's finding that KSOL(FM)'s performance during the 1977-80 license term was substantial is dispositive. Hence the Board's determination that Intercontinental is entitled to a renewal expectancy stands.

5. A second matter, not before the Board, also warrants discussion. San Mateo seeks addition of an abuse of process issue against Intercontinental. San Mateo's request stems from allegations raised in BC Docket No. 82-343, a comparative renewal proceeding involving Station WBNX, New York, New York, which is licensed to United Broadcasting Company of New York, Inc. That licensee is a subsidiary of United Broadcasting Company, Inc., Intercontinental's corporate parent. In BC Docket No. 82-343, the ALJ designated an abuse of process issue against the licensee based on allegations that Jimmy Jimenez, WBNX's program director and Gisela Huberman, an attorney assisting in the litigation of the WBNX proceeding, had attempted to dissuade Roberto Napoleon, a potentially adverse witness, from testifying. San Mateo contends that an issue should be designated here to determine whether such misconduct should be imputed to Intercontinental. Intercontinental responds that there is no nexus between the misconduct and Intercontinental.

6. San Mateo has demonstrated no basis to add an issue in this proceeding. The allegations in the WBNX proceeding involve only employees at that other station. It is entirely speculative at this point whether the alleged incident may involve practices of the corporate licensee with any significant implications for Intercontinental. Moreover, no similar misconduct has occurred in this proceeding. The allegations are thus too tenuous a basis for reopening this proceeding at this stage.[4]

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[3] FCC 84-639 at paras. 3-8.

[4] *Cf. Cleveland Television Corp.* v. *FCC*, 732 F.2d 962, 973 n. 13 (D.C. Cir. 1984).

Additionally, in his Initial Decision in BC Docket No. 82-343 the ALJ ultimately rejected the allegations of abuse of process.[5] Thus, San Mateo's Petition will be denied.

7. ACCORDINGLY, IT IS ORDERED, That the Decision of the Review Board, FCC 84R-52, released July 27, 1984, IS MODIFIED as described herein.

8. IT IS FURTHER ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules the Applications for Review filed September 19, 1984 by San Mateo Broadcasting Company, Inc. and Afro-American Communications ARE DENIED and the Contingent Application for Review filed September 19, 1984 by Intercontinental Radio, Inc. IS GRANTED to the extent indicated herein and otherwise DENIED.

9. IT IS FURTHER ORDERED, That the Contingent Petition to Enlarge Issues filed September 25, 1984 by San Mateo Broadcasting Company, Inc. IS DENIED.

10. IT IS FURTHER ORDERED, That the Motion Requesting that Chairman Mark S. Fowler Recuse Himself from this Proceeding filed February 7, 1985 by San Mateo Broadcasting Company, Inc. IS DISMISSED as moot.[6]

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

SEPARATE STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Intercontinental Radio, Inc. — KSOL(FM) — San Mateo, California FM Radio Comparative Proceeding (BC Docket Nos. 81-890/92).

I support this decision because as I stated in *WOOK(FM)*[1], a multiple license owner does not necessarily risk unlimited liability because of misconduct at one station. However, because this case is superficially similar to *WOOK(FM)*, I write separately to briefly articulate why I found the two cases distinguishable.

Since "individual stations have different broadcast histories and policies"[2], clearly, logical limits of liability can be drawn within the frame-

[5] FCC 85D-1, released January 11, 1985.

[6] As noted above, Chairman Fowler has not participated in the action taken by this Memorandum Opinion and Order.

[1] *United Broadcasting Co., Inc.* (*WOOK(FM)*), FCC 84-639, released January 14, 1985 (Dissenting Statement of Commissioner Henry M. Rivera), n. 25.

[2] *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 237 (D.C. Cir. 1981).

work of *Faulkner Radio, Inc.*[3] and *Cowles Broadcasting, Inc.*[4]. I think that is what we did in this case — draw logical limits of liability due to KSOL(FM)'s clean record and isolation from WOOK(AM)'s and WFAB's prior misconduct. In sum, I endorse the Review Board's reasoning herein.[5]

[3] 88 FCC 2d 612 (1981).

[4] 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1774 (1983).

[5] "No such 'palpable nexus' has been shown between KSOL and WOOK(AM) (or WFAB) . . . . [T]he broadcast record of KSOL(FM) — from 1968 to date — is absolutely free of violations of any FCC rules or policies." *International Radio, Inc.*, 56 RR 2d 903 at para. 7 (Rev. Bd. 1984). *See also* paras. 5 and 6.

Diversification of Control of Mass Media
Ownership and Management, Integration of

Review Board awarded slight to moderate diversification of media control preference to applicant with 98% attributable ownership interest in small UHF TV station located 26 miles from proposed FM community of license versus applicant with 100% interest in in-town daytime-only 500-watt AM station which is the only broadcast facility licensed to proposed FM community. This preference outweighed opponent's very slight ownership integration preference.
—*J.B. B/cing of Texas, Inc.*
MM Docket No. 83-1273

85R-32

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
J.B. Broadcasting of Texas, Inc. Cuero, Texas	MM Docket No. 83-1273 File No. BPH-821026AQ
Gobbler Communications Company Cuero, Texas	MM Docket No. 83-1274 File No. BPH-830214AA
For Construction Permit	

Appearances

J. Dominic Monahan and *Thomas J. Hutton*, on behalf of J.B. Broadcasting of Texas, and *Richard A. Helmick*, on behalf of Gobbler Communications Company.

DECISION

Adopted: April 1, 1985; Released: April 22, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL. BOARD MEMBER BLUMENTHAL DISSENTING WITH STATEMENT.

BOARD MEMBER JACOBS:

1. It is fundamental to comparative broadcast proceedings that an applicant's ownership of other media interests (the diversification of media control criterion) is given greater decisional weight than the extent of its ownership participation in day-to-day management of the proposed station (the ownership integration criterion). *See Colorado West Broadcasting, Inc.*, 57 FCC 2d 526, 530, 35 RR 2d 1637, 1642 (Rev. Bd. 1976). This approach reflects the Commission's general disinclination to perpetuate or expand a local broadcast media monopoly where an opportunity is presented for a new media voice to emerge. *See Multiplex Communications, Inc.*, 95 FCC 2d 406, 54 RR 2d 733 (Rev. Bd. 1983). *See generally Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), where the Supreme Court held that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[1] However, in the instant case, presiding Deputy Chief Administrative Law Judge James F. Tierney (ALJ) concluded that the other media interests of both applicants were essentially cross-cancelling and awarded the construction permit for a new FM broadcast station at Cuero, Texas to J. B. Broadcasting of Texas, Inc. (J.B.), based on its slight advantages in quantitative and qualitative ownership integration credit over Gobbler Communications Company (Gobbler). Initial Decision (I.D.), FCC 84D-59, released August 24, 1984, paras. 19, 27.[2]

2. Gobbler has called foul, and the proceeding is now before the Review Board on exceptions filed by Gobbler and J.B.'s reply brief. Oral argument was held on January 25, 1985. The Board has reviewed the I.D.

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[1] In the *Second Report and Order in MM Docket No. 84-231*, FCC 85-124, released April 12, 1985, the Commission has decided to give special consideration to daytime-only AM licensees applying for an FM channel in their community of license. However, because that action is prospective only and is limited to applications for FM channels recently allotted to implement BC Docket No. 80-90, Cuero's Channel 249A, which is the subject of this Decision, is beyond the ambit of that limited policy shift.

[2] A third entity, Cuero Communications Company, was the lead applicant in this proceeding (File No. BPH-820907AF) and was also designated for hearing. However, by Memorandum Opinion and Order, FCC 84M-1212, released March 12, 1984, its application was dismissed with prejudice by the ALJ pursuant to a settlement agreement. I.D., para. 2.

in light of the foregoing and our examination of the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, but conclude that the diversification criterion rather than the applicants' ownership integration proposals is dispositive here and that grant of Gobbler's application will better serve the public interest, convenience, and necessity.

3. At the outset it is important to emphasize that, for purposes of this proceeding, J.B. is presently the 100% owner and operator of the only AM, FM, or television broadcast facility licensed to the community of Cuero, Texas (1980 population, 7124) — a 500-watt daytime-only AM station, KEWS.[3] The only other media of mass communications situated in Cuero are the *Cuero Record*, a twice-weekly newspaper with a circulation of 3116 (The IMS '84 Ayer Directory of Publications 880, cited in J.B. Reply Br. at 10, official notice taken), and a 2126-subscriber cable television system operated by Karnack Cable TV of Cuero (U.S. Copyright Office, 1984 Statement of Account, official notice taken — Exh. H of J.B. Reply Br. Supp.).

4. Under the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394-5, 5 RR 2d 1901, 1908-09 (1965), the appropriate comparative weight to be given to an applicant's other media interests is directly related to the type of other media, size of ownership interest, proximity of other media to the applicant's proposed community of license, significance of other media in terms of area covered, size of audience, number of facilities, etc., significance in terms of regional or national coverage, and significance with respect to other media in their respective localities. By these standards it is clear beyond peradventure that J.B.'s 100% ownership of the only existing broadcast facility in town at the same time that it seeks to acquire a second facility in the very same town is of monumental comparative significance. Indeed, under such circumstances, where an opposing applicant owns no other media, its diversification preference over the in-town monopolist has been held to be well-nigh overwhelming, *Windham Broadcasting Group*, 49 FCC 2d 560,

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[3] J.B. sold KEWS in April 1984, four months after the Cuero FM applications were designated for hearing in Hearing Designation Order, Mimeo MM 1122, released December 8, 1983, and only one month before the May 29, 1984 hearing. Prior to this post-cutoff date sale, J.B. did not announce any commitment to divest its AM station. Thus, we are obliged to treat the sale as a comparative upgrading which must be ignored lest Gobbler's application be seriously prejudiced. *See High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 55 RR 2d 627 (Rev. Bd. 1983), *rev. denied*, 56 RR 2d 1394 (Comm'n 1984); *Muncie Broadcasting Corp.*, 89 FCC 2d 123, 129-30, 51 RR 2d 46, 51-52 (Rev. Bd. 1982), *rev. denied*, FCC 83-234 (Comm'n 1983). All Board Members are in agreement that the Commission's prohibition against post-cutoff comparative upgrading is part of the administrative due process requirements of comparative proceedings. *Allied Broadcasting, Inc.* v. *FCC*, 435 F.2d 68, 70 n. 9 (D.C. Cir. 1970); *Cleveland Television Corp.* v. *FCC*, 732 F.2d 962, 965 n. 2 (D.C. Cir. 1984).

31 RR 2d 1292 (ALJ), *aff'd*, 49 FCC 2d 556, 31 RR 2d 1289 (Rev. Bd. 1974), for the second applicant permits the emergence of a new media "voice" and avoids the creation of an absolute media monopoly. *See KBBS, Inc.*, 91 FCC 2d 115, 52 RR 2d 185 (Rev. Bd. 1982); *Brownfield Broadcasting Corp.*, 93 FCC 2d 1197, 53 RR 2d 1175 (Rev. Bd. 1983), *rev. denied*, FCC 84-11 (Comm'n 1984); *WFSP, Inc.*, 56 RR 2d 1449, 1450 (Rev. Bd. 1984) (Opinion by Bd. Member Blumenthal: "While we appreciate WFSP's natural ambition to retain a broadcasting monopoly in Kingwood, our appreciation does not go so far as to assist it in its happy endeavor or to unduly prolong its dominance in an era when 'marketplace competition' is the byword."),[4] *rev. denied*, FCC 85-129 (Comm'n 1985). Even where there were already six AM and FM stations and four television stations licensed to a community, the Commission has held that the diversification preference for bringing a new media voice there, as opposed to creating an AM/FM ownership combination, is sufficient to overcome the incumbent AM licensee's substantial preferences for ownership integration and past broadcast record. *See Communications Property, Inc.*, FCC 83-320 n. 1. (Comm'n 1983), *aff'ing* 92 FCC 2d 45, 52 RR 2d 981 (Rev. Bd. 1982).

5. However, the instant case is less clear-cut than *KBBS* and its progeny because here the second applicant (Gobbler) also has an existing attributable media interest; it is 98% owned by Victoria Communications Corporation, which is the 100% owner and licensee of a 155-kilowatt ABC television network affiliate, KVCT (Channel 19), at Victoria, Texas, some 26 air miles from Cuero. I.D., para. 8. Moreover, it appears that KVCT's predicted Grade B signal strength contour encompasses Cuero and that this contour overlaps 87.5% of the area and 95.3% of the population within Gobbler's proposed 1.0mV/m FM contour. KVCT license file (official notice taken); I.D., n. 2. The ALJ inferred from these data that Gobbler would not be a "new" voice in Cuero; indeed, he concluded that it was a "veteran" voice, so that "diversification between the parties is virtually equal and no meaningful preference can or will be accorded either." I.D., para. 19.

6. J.B. is willing to accept the ALJ's refusal to accord either applicant a diversification preference, but Gobbler urges in its exceptions that it deserves a slight to moderate diversification preference over J.B. In evaluating these contentions, we must take into account not only the comparative criteria for weighing other media set forth in paragraph 4,

[4] While the Dissent to today's grant displays the usual hyperbolic zeal, it is spare in analytical depth, perhaps because many of the leading case precedents supporting our action were penned by the dissenter himself. Since they are the most eloquent response to his latest musings, we have hereinafter specially identified them "(NBB opinion)" for the reader's convenience. Judging by the dissenter's intemperate footnote 6, he is embarrassed and befuddled by this publicity. Alas, invective, like patriotism, is the last refuge of the . . . ah, dissenter. And this is one time that the Majority will not endure in silence.

supra, but also the Commission's interpretative gloss over those criteria, namely that "Other interests in the principal community proposed to be served will normally be of most significance, followed by other interests in the remainder of the proposed service area .... However, control of large interests elsewhere in the same State or region may well be more significant than control of a small medium of expression (such as a weekly newspaper) in the same community." *Policy Statement*, *supra*, 1 FCC 2d at 394-95, 5 RR 2d at 1908-09. Simply stated, we must determine which offends the Commission's diversification goals more — permitting J.B. to be the 100% owner of the only two broadcast facilities licensed to Cuero and thereby establishing a monopoly there, or authorizing Gobbler to own one of Cuero's two radio stations plus a UHF television station located 26 miles away in Victoria.

7. In making this judgment J.B. asserts that television is the "dominant media of mass communications in this country today" and that Gobbler's KVCT is "undeniably a voice in the community [of Cuero]" and is a " 'local' station in Cuero by virtue of Commission precedent and rules." J.B. Reply Br. at 6, 7, 12. While we will not gainsay the first proposition, and the second one is a truism insofar as it argues that KVCT is "seen and heard" within Cuero, we flatly reject as statements of law or reality J.B.'s view that KVCT is a "local" station in Cuero for diversification or other regulatory purposes. The regulatory fountainhead of a broadcast licensee's obligations is its community of license, "the principal community or other political subdivision which it primarily serves," Section 73.1120(a) of the Commission's Rules, 47 CFR 73.1120(a). Absent dual-city licensing, a station's responsibilities to any other communities within its service area are secondary. *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 714, 5 RR 2d 389, 397 (Rev. Bd. 1982) (NBB opinion); *State of New Jersey Television Service*, 58 FCC 2d 790, 797-98, 36 RR 2d 1105, 1114-15 (1976). Although television stations — unlike radio stations — are generally considered as providing "an areawide, rather than a localized service," *St. Louis Telecast, Inc.*, 22 FCC 625, 713, 12 RR 1289, 1369 (1957), even they are accorded "considerable discretion as to serving outlying areas." *State of New Jersey Television Service*, *supra*, citing *Primer on Ascertainment of Community Problems*, 27 FCC 2d 650, 654, 21 RR 2d 1507, 1512 (1971). Finally, we note the Commission's recent exposition on ownership diversity in *Multiple Ownership (Regional Concentration of Control Provisions)*, 55 RR 2d 1389, 1393 (1984), in which it abolished the Commission's regional concentration of control provisions and affirmed that retention of the "duopoly" and "one-to-a-market" rules were adequate to assure diversity and competition in "local market situations." Not being licensed to Cuero, having only a secondary service obligation to Cuero, being physically located 26 miles away from

Cuero, and not breaching any Commission local-market ownership prohibitions, Gobbler's Victoria television outlet, KVCT, simply cannot be treated as "local" to Cuero.[5,6]

8. Conversely, J.B. attempts to diminish the diversification significance of its ownership of KEWS in three ways. First, it emphasizes the existence of Cuero's non-broadcast media — the *Cuero Record* and Karnack Cable (see paragraph 3, *supra*) — and urges that these media, plus the 10 television stations, 4 FM stations, and 10 satellite programming services that Karnack Cable carries, significantly dilute the importance of giving J.B. two radio "voices" of its own in Cuero. However, J.B.'s numerology is unavailing. While the Commission does recognize the relevance of other local media in a diversification analysis, *see WFSP, Inc., supra*, the essential focus is on other local media of the same type. *See Nuance Corp.*, 85 FCC 2d 412, 49 RR 2d 147 (Rev. Bd.), *rev. denied*, FCC 81-473 (Comm'n 1981) (substantial diversification preference given where opponent's existing AM station was one of five AM and five FM stations licensed to community); *Policy Statement*, *supra*, 1 FCC 2d at 395, 5 RR 2d at 1909 ("The number of other mass communication outlets of the same type in the community proposed to be served will also affect to some extent the importance of [other media interests] . . . in the general comparative scale.").[7] Here KEWS is the only radio station licensed to Cuero. However, even when a diversification analysis expressly weighs other types of local media, the existence of these media usually has no decisional effect. *See WFSP, Inc., supra; but cf. Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 987, 55 RR 2d 926, 929 (1984) (principal's "modest" other media interests and non-ownership managerial position in applicant given "extremely minor significance" in light of 4 TV, 6 AM, and

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[5] J.B.'s and the Dissent's notion that Gobbler's FM proposal is "just barely permissible" under Section 73.3555(b) of the multiple ownership rules, 47 CFR 73.3555(b), is erroneous. Not only does KVTC's Grade A service contour fall some 10 miles short of Cuero, but, even if it encompassed Cuero, Note 4 to the rule would require an *ad hoc* determination whether such ownership would be impermissible because KVCT is a UHF station.

[6] We also reject J.B.'s argument that KVCT's status as a "must-carry" signal on Cuero's cable system makes it a "local" station for diversification purposes. KVCT's carriage flows *ipso facto* from Cuero's location within KVCT's 35-mile zone. Section 76.59(a)(1) of the Rules, 47 CFR 76.59(a)(1). No ownership diversity considerations are embodied in this rule, and it would require carriage even if KVCT's Grade B contour fell short of Cuero and KVCT's signal were not available off-the-air. *See Staunton Video Corp.*, 42 FCC 2d 1119, 28 RR 2d 706 (1973).

[7] Because of the *Policy Statement's* concentration on local media, we regard as irrelevant J.B.'s showing (February 19, 1985 supplement) that Cuero is currently within the full-time coverage area of Station KVIC(FM), Victoria, Texas, and within the daytime coverage area of San Antonio AM Stations KSLR and KKYX, and that Victoria Stations KZEU(FM) and KTXN-FM and San Antonio AM Station WOAI hold construction permits which will give them full-time coverage of Cuero in the future.

7 FM stations licensed to community and one daily newspaper). The simple fact is that KEWS is not in competition with any other Cuero broadcast media (there aren't any), and this is what counts; Commission precedent gives little or no diversification dilution credit for competition with non-broadcast media (including non-local radio and television stations carried by local cable systems), and we are not at liberty to hold otherwise.

9. J.B.'s second argument for KEWS's unimportance is an attack on Commission precedents which accord greater diversification "demerit" to an applicant's existing media interests if they are in the same type of service as the new station for which it is applying. *See Cleveland Television Corp.*, 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *rev. denied*, FCC 83-235 (Comm'n 1983), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984); *Commanche Broadcasting, Inc.*, 97 FCC 2d 1059, 56 RR 2d 289 (Rev. Bd. 1984) (NBB opinion); *Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 55 RR 2d 1326 (Rev. Bd. 1984) (NBB opinion). Under these precedents J.B. fares worse than Gobbler because the latter is seeking to augment its TV holding with an FM radio station while J.B. is proposing to establish an AM/FM radio combination. The precedents against which it lamely protests reflect the Commission's view that the potential multiplication of media interests of the same type poses a greater "threat" to media diversification than does ownership of a variety of different media. J.B. offers no substantive criticism of this application of the Commission's multiple ownership policies to comparative hearings, other than to urge that the policy should be limited to TV media interests. This objection is duly noted and denied. Although the cited precedents all involve TV interests, it is clear that the underlying rationale is equally applicable to radio holdings.

10. Finally, J.B. presents various data purporting to portray KVCT as a full-time network media behemoth which is gobbling up tremendously larger audiences than KEWS and covers a much larger geographical area. Hence, according to this argument, the size and importance of KVCT as a regional entity offsets the fact that it is nominally licensed to Victoria and balances KEWS's significance as an in-town medium for diversification purposes. Unfortunately for J.B., its line of reasoning fails as a matter of law and fact to equalize the diversification status of KEWS and KVCT. First, a word about audience sizes and geographical coverage. Incredibly, J.B. has failed to supply any data on either score for its own licensee, KEWS! Instead it would have us infer that KEWS's coverage area and size are very small (perhaps no greater than Cuero's city limits and 7124 persons), while KVCT's are vast — equal to the entire 110,720 persons located within its 2884 square mile Grade B contour! This is sheer nonsense. We decline to speculate about KEWS's audience and coverage area but take official notice that KVCT's 1984 net weekly circulation was

only 31,800 persons.[8]

11. In its pleadings, J.B. also depicts KVCT as very powerful electronically, compared to KEWS's miniscule 500 watts. However, this comparison is even more misleading than the preceding one. KVCT's 155 kilowatts are considered relatively low power for a UHF station, and the relevant question is not how great the power but rather how large the coverage area. J.B. asserts that KVCT's Grade B contour has a 33.3 mile radius, but yet that contour hardly reaches beyond Cuero, which is 26 air miles from Victoria (Tr. 91). Either way, a Grade B contour of 26 or 33 miles is hardly the mark of a powerful television facility. This point is well illustrated by Station KAVU-TV, the other network-affiliated UHF station in Victoria, which has an authorized power of 933 kilowatts (6 times KVCT's!) but whose Grade B contour does not even reach Cuero. Moreover, we take official notice that KVCT and KAVU-TV together comprise the Victoria, Texas television market, which ranked 202 out of 209 in Arbitron's 1983-84 ADI television households ranking (Factbook, *supra* n. 8, at 5), compared to the San Antonio market which ranked 45th (*id.* at 2). The Victoria market had 25,900 households versus San Antonio's 506,200. *Id.* This comparison — not offered by J.B. — has relevance because J.B. concedes that three of the four commercial stations in the San Antonio market encompass Cuero within their Grade B contours and all are carried by the Cuero cable system, as is KVCT. Thus, when J.B.'s selective data concerning KVCT are put into proper perspective vis-a-vis the other television station in its own market and the several San Antonio stations with which it competes in Cuero for both off-the-air and cable television viewership, J.B.'s regional dominance argument about KVCT crumbles into dust. *Requiescat in pace.*

12. J.B's last "bigness" argument focuses on KEWS' programmatic "smallness" — its daytime-only operating authority — and its desire to reach full-time status through owning an AM/FM combination. However, it is well established that the diversification significance of owning an in-town AM station is not diminished by its operation only during daytime hours. *Brownfield Broadcasting Corp., supra; Hassayampa Broadcasting*, 92 FCC 2d 472, 52 RR 2d 1059 (Rev. Bd. 1982), *rev. denied*, FCC 83-295 (Comm'n 1983); *Colorado West Broadcasting, Inc., supra.* While an FM grant will permit both the daytimer and its opponents to provide a new nighttime radio voice, only its opponents will also be able to offer a new daytime voice. That is the critical diversification fact. *Id.* Also see

[8] Net weekly circulation is the standard measure of television audiences and is defined as the estimated number of television households viewing a particular station at least once per week, Monday-sunday, sign-on to sign-off. The data in this discussion were taken from the Arbitron Ratings, Company's 1984 surveys as recorded in the Stations Volume of the 1985 edition of Television Factbook (Factbook).

note 1, *supra*. Hence, J.B. is not entitled to any "special consideration" for proposing to operate an AM/FM radio combination in Cuero.

13. In sum, we conclude that, in the face of numerous and well-reasoned Commission precedents, J.B. has grossly understated the diversification significance of its 100% ownership of Cuero's only existing broadcast facility and has grossly overstated the importance of Gobbler's 98% attributable ownership of a small UHF station located 26 miles away. Because the proposed 1.0 mV/m contour of Gobbler's FM station does not reach Victoria, neither of the *Policy Statement's* prime diversification concerns about an applicant having other media interests in the proposed community of license or in the "service area" (see paragraph 6, *supra*) is raised by Gobbler's ownership of KVCT. And we have concluded in paragraph 7, *supra*, that KVCT cannot be regarded as a "local" station in Cuero. Thus, *sans* J.B.'s hyperbole, the ultimate diversification choice pits a regional television ownership against an in-town AM ownership.

14. No Commission precedent precisely addresses this diversification comparison. Cases such as *KBBS, Inc., supra*, are inapposite because they pit in-town AM ownership against a total absence of other media interests. See paragraphs 4 and 5, *supra*. Nor do we believe that *CJL Broadcasting, Inc.*, 95 FCC 2d 544, 54 RR 2d 1037 (1983), relied upon by both Gobbler and J.B., is controlling. There, the Commission awarded a moderate diversification preference to an "out-of-town" daytime AM licensee (located right across the river from the proposed FM community of license) over the competing application of a full-time, in-town AM licensee which also had attributable interests in two distant radio stations. The instant case is considerably different because Gobbler's ownership of a UHF station 26 miles from Cuero can nowise be analogized to ownership of a full-time Cuero AM station and because Gobbler owns no other media interests but the Commission gave significant weight to two additional distant radio interests in *CJL*, *supra*, 95 FCC 2d at 549, 54 RR 2d at 1041-42.[9] Likewise, *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 46 RR 2d 1467 (Rev. Bd. 1980), is not dispositive. There, the Review Board gave only a

[9] At oral argument, the Board acknowledged that, of course, a television signal has an aural component (FM audio) as well as a video picture. Tr. 118. However, this verity does not convert ownership of an out-of-town television station into ownership of an in-town TV/radio station combination, let alone an in-town AM or FM radio station. *See Tupelo Broadcasting Co., Inc.*, 12 RR 1233 (1956), and *The Monocacy Broadcasting Co.*, 29 FCC 717, 19 RR 165 (1960), where the presence of television signals was deemed irrelevant to an examination of the availability of other primary broadcast services in an AM case. Indeed, the Commission specifically held in *Tupelo*, *supra* at 1250, that "It cannot be contended that television is a substitute for an [AM] broadcast service for it is a separate, distinct and entirely different type of service." This comes as no surprise to anyone in Cuero with only an AM or AM/FM radio receiver, who will be completely unable to receive either the aural or the video component of Gobbler's KVCT television signal but will be able to hear J.B.'s KEWS well.

slight diversification preference to an out-of-town daytime AM licensee (this one located eight miles from the proposed FM community) against a full-time in-town AM licensee which didn't have any other media interests. The preference was "slight" because the daytime AM station was much more powerful than the full-time AM, had a service area that completely encompassed the applicants' proposed FM service areas, and was "close by" the proposed FM community. 80 FCC 2d at 121, 46 RR 2d at 1479. Again, our situation is distinguishable. Here, J.B.'s daytime AM station is in town, Gobbler's UHF station is three times as far out of town as the daytimer in *Radio Greenbrier*, and the UHF station overlaps only 87.5% of the proposed FM service areas (see paragraph 5, *supra*).

15. Of the 16 relevant Commission precedents that we have studied (12 of which have already been cited), we conclude that the two closest ones analytically to the instant case are *Colorado West Broadcasting, Inc., supra*, and *Multiplex Communications, Inc., supra*. In *Colorado West*, the Board held that an FM applicant which had a 29.5% attributable ownership interest in a daytime AM licensee located 42 miles from the proposed FM community was entitled to a substantial diversification preference over its opponent, which was the 100% owner of the only existing broadcast facility in the proposed FM community, a daytime AM station. And in *Multiplex*, an FM applicant with a 30% attributable ownership interest in an AM/FM station combination located 75 miles from the proposed FM community and a 30% interest in an AM station 125 miles from the FM community received a substantial preference over the 100% owner of a daytime AM station which was the only existing broadcast station in the FM community. Both cases demonstrate that media interests which would otherwise support a substantial-overwhelming diversification preference (100% ownership of the only in-town broadcast facility), *see KBBS, Inc., supra*, may yield only a substantial preference (or less), depending on the nature, quantity, location, etc. of the other applicant's other media interests. See paragraph 4, *supra*.

16. In applying these precedents to the instant case, we must also take account of the *Policy Statement's* injunction that large regional media interests may be more significant than a small medium of expression in the same community as the proposed new station. See paragraph 6, *supra*. J.B. strenuously maintains that Gobbler's KVCT represents such a large regional interest and J.B.'s KEWS, a small medium of much less significance. Reply Br. at 12. We disagree. While we endorse J.B.'s alternative characterization of KVCT as a regional rather than a local medium, *id.*, we cannot concur with the notion that KEWS, the only broadcast station presently licensed to Cuero, qualifies as the type of insignificant "small medium of expression" that the *Policy Statement* had in mind. *See Colorado West Broadcasting, Inc., supra*, 57 FCC 2d at

529 n. 7, 35 RR 2d at 1641 n. 7. Nor does the record support the view that KVCT is a "large" media interest or dominant in the region. See paragraphs 10-12, *supra.* Thus, we conclude that the Commission's "normal" emphasis on in-town media as the focus of primary diversification concern (see paragraph 6, *supra*) is appropriate here. On the other hand, we recognize that Gobbler's 98% ownership of KVCT, the fact that Victoria is "only" 26 miles from Cuero, and the fact that KVCT covers 87.5% of the proposed FM stations' service areas do make Gobbler's KVCT ownership somewhat more significant than the out-of-town media interests in *Colorado West Broadcasting, Inc., supra*, and *Multiplex Communications, Inc., supra.* As a result, and again noting that KVCT is not an aural facility, we hold that Gobbler is entitled to a slight to moderate diversification preference over J.B. *Cf. Radio Greenbrier, Inc., supra.*

17. As to the ownership integration comparative criterion, the ALJ awarded a slight integration preference to J.B. because of its 3.48% owner and proposed full-time general manager, John Bumgardner, who has 20 years of previous broadcast experience, local residence, and civic participation, versus Gobbler's 2% owner and proposed full-time station manager, Carl D. Young, who has five years of previous broadcast experience and is entitled to a minority enhancement preference but lacks local residence (present or future) and prior civic participation. Gobbler urges that neither applicant deserves a preference over the other. With such small quantitative integration credit on both sides, and with J.B.'s quantitative margin being so slight (1.48%), the Board agrees that an overall integration preference is barely merited in the instant case, but we conclude that J.B. deserves a very slight preference in recognition of its miniscule quantitative ownership edge as enhanced by Mr. Bumgardner's significant previous broadcast experience and credit for local residence and civic participation. These three qualitative enhancements exceed Mr. Young's enhancements for minority ownership and less previous broadcast experience. *See Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 55 RR 2d 991 (Rev. Bd. 1984), *rev. denied*, FCC 85-74 (Comm'n 1985).[10] However, the "best practicable service" rubric of the *Policy Statement's* comparative analysis encompasses auxiliary power proposals, as well as ownership integration. *See Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667, 6 RR 2d 861 (1966). And Gobbler

[10] We deny Gobbler's attempt to receive an additional 5.5% integration credit for the proposed part-time participation of Dewey T. Acker as general manager. Mr. Acker's 20-hour per week undertaking is too vaguely set forth in terms of actual duties and work schedule in Cuero and is fairly susceptible to the interpretation that he would largely "manage" via telephone from his full-time job in Victoria (Tr. 58-60). Even part-time ownership integration proposals require more. *See Georgia Mountain Corp.*, 57 RR 2d 1020 (Rev. Bd. 1985), citing *Greater Wichita Telecasting, Inc., supra.*

alone has proffered such a proposal, which is entitled to a minor preference. *See Big Bend Broadcasters*, 96 FCC 2d 166 (Rev. Bd. 1983), *rev. denied*, FCC 84-645 (Comm'n 1984). This preference further reduces the significance of J.B.'s integration preference almost to the point of gossamer.

18. All decisionally significant exceptions have been considered. We have awarded Gobbler a slight to moderate diversification preference and a minor (or very slight) auxiliary power preference, and J.B. has received a very slight ownership integration preference. Even without the auxiliary power preference Gobbler would prevail, because diversification stands as one of the two major pillars of the *Policy Statement's* comparative analysis, while integration is just one ingredient in the other pillar — best practicable service. As such, diversification is a more significant factor, *Colorado West Broadcasting, Inc., supra*, and a diversification preference outweighs any comparable or lesser preference under any single element of best practicable service, including integration. *Big Bend Broadcasters, supra.* Thus, Gobbler's diversification preference triumphs over J.B.'s integration preference, standing alone, and when the comparison is broadened to balance diversification of media ownership against best practicable service, Gobbler's edge becomes even slightly greater as its auxiliary power preference cuts into J.B.'s ownership integration advantage. Gobbler — clearly no turkey here — is the winner.

19. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Gobbler Communications Company on September 24, 1984 (and supplemented on September 27, 1984) and by J.B. Broadcasting of Texas, Inc. on March 14, 1985 ARE GRANTED, and the amendments ARE ACCEPTED.

20. IT IS FURTHER ORDERED, That the motion for leave to supplement reply brief filed by J.B. Broadcasting of Texas, Inc. on February 19, 1985 IS GRANTED; and

21. IT IS FURTHER ORDERED, That the application of Gobbler Communications Company (File No. BPH-830214AA) for a construction permit for a new FM station at Cuero, Texas IS GRANTED, and the application of J.B. Broadcasting of Texas, Inc. (File No. BPH-821026AQ) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

Dissenting Statement
of
Board Member Norman B. Blumenthal

A serious and unnecessary injustice is done by this decision. And, as in the case of *CJL Broadcasting, Inc.*, 95 FCC 2d 544 (1983), *reversing* 88 FCC 2d 750 (Rev. Bd. 1981), the Commission's remedial intervention is invited.

The relevant facts are not in dispute. One applicant, J.B. Broadcasting, is the "constructive" owner[1] of a 500 watt daytime-only station in Cuero, Texas.[2] Its opponent, Gobbler owns 98% of a television station just 26 miles down the road in Victoria, Texas, one of two television stations licensed to Victoria, the closest television stations to Cuero. Gobbler's television station already places a Grade B signal over all of Cuero, day and night.[3]

Hence, the dispositive question is: a grant of the new fulltime FM facility to which applicant will best promote a diversity of voices in the reception area — a grant to the applicant charged with only a mini-powered daytime AM station, or a grant to the applicant already having a full power, fulltime station which fully covers Cuero (and a *television* station at that). Or — in other words — is it fair or reasonable to end this proceeding with the owner of one powerful fulltime facility getting a *second* fulltime facility, while its instant competitor is left without even

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[1] J.B. actually sold its Cuero daytime-only AM station earlier in 1984. *Memorandum Opinion and Order*, FCC 84M-2436 (released May 25, 1984). It is "constructively" charged with the station for our instant comparative purposes. *See ante* para. 3 & n.3.

[2] J.B.'s "attributable" 500 watt daytime-only station is about as low on the broadcast licensing scale as is possible. *See* 47 CFR §73.182(V). We are not here discussing a 50,000 watt clear channel station. Moreover, while the majority asserts that Gobbler's television station's (KVCT-TV) power of 155,000 watts is "relatively low power for a UHF station," *see ante* para.11, Gobbler can raise its power to *5 million watts*. 47 CFR §73.614.

[3] In fact, if Gobbler's television station were merely 10 miles (or so) closer to Cuero, the Commission's multiple ownership rules might bar its instant application without a strong public interest showing. 47 CFR §73.3555(b) Note 4 (1984). That is, while new AM/FM combinations are permitted, FM/TV (or AM/TV) are not, because television is so much more powerful and influential a media "voice." That Gobbler's current FM application is just barely permissible under our multiple ownerhsip rules is a measure of the overwhelming diversity demerit it should have received. Moreover, at oral argument before the Board, Gobbler counsel conceded the following:

> CHAIRMAN MARINO: It's recognized, isn't it, that TV is the dominant medium of communications at night? I think we could take official notice of that, couldn't we, that fact?
>
> MR. HELMICK: I think that is probably correct.

Tr. of Oral Arg. (January 25, 1985), at 93. Thus, Gobbler's (network-affiliated) television station would still be considered dominant at night, even if J.B. were here awarded the FM channel.

its *first* fulltime voice to cover Cuero? If you add to that the fact that Gobbler would then hold the two far more preferable broadcasting frequencies — television and FM radio[4] — the mismatch becomes all the more incandescent.

Lamenting its own result in somewhat similar circumstances, a majority of the present members of this Board pointed out in *CJL Broadcasting* that the grant of an FM frequency to the local applicant already having a fulltime AM station, while denying the local competitor having a daytime-only FM facility, was an unfortunate anomaly. The Board majority complained[5]:

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[4] A decade ago, AM radio would have been the favored service, and FM considered a weak step-sister. *See, e.g., Simon Geller,* 90 FCC 2d 250, 267 (1982), *reversed and remanded, Committee for Community Access* v. *FCC,* 737 F.2d 74 (D.C. Cir. 1984); *see also Intercontinental Radio, Inc.,* 56 RR 2d 903, 928 n.111 (Rev. Bd. 1984), *review denied,* FCC 85-108, released March 13, 1985 (Comm'n). However, the AM/FM competitive situation has since been completely reversed. In a recent speech, the president of ABC Radio, Ben Hoberman, stated:

> But even with a superior staff, AM is confronted with some very difficult challenges. *Audience shares for FM have been rising. AM's shares have been declining. Nationally it's about 70-30 in favor of FM.* The radio marketplace as a whole is fragmented . . . . Competition is keener, and FM has some strong advantages. Stereo is primarily heard on FM and will be until AM stereo receivers are in the hands of the public. Sound quality is superior on FM. Music sounds better on FM. Generations of teenagers and young adults have been nurtured on FM listening. And AM is faced with a technological prejudice. The sound reproduction on AM receivers is still not good enough. Many portable radios carry only the FM band, entirely ignoring the fact that there are more AM than FM stations. It's not easy for an AM operator. He or she has to overcome these handicaps and compete on a equal basis with their FM brethren.

Television/Radio Age, January 21, 1985, at p. 45.

An example of the 70-30 competitive advantage is reflected in the latest ratings of the Washington, D.C. area radio stations:

Fall Rank	*Station*	*Fall '84*	*Summer '84*	*Spring '84*	*Fall Rank*	*Station*	*Fall '84*	*Summer '84*	*Spring '84*
1.	WMAL-AM	9.7	6.6	7.2	13.	WASH-FM	2.8	2.6	2.2
2.	WGAY-FM	8.2	8.5	8.0	14.	WDJY-FM	2.8	3.7	2.7
3.	WKYS-FM	7.3	8.2	8.9	15.	WPKX-FM	2.8	2.8	3.0
4.	WHUR-FM	6.4	7.1	7.3	16.	WXTR-FM	2.1	2.5	2.6
5.	WWDC-FM	5.8	5.3	4.2	17.	WEZR-FM	1.6	1.8	1.5
6.	WROX-FM	5.3	5.6	5.7	18.	WHES-FM	1.6	1.7	1.2
7.	WLTT-FM	4.6	4.7	4.6	19.	WWRC-AM	1.5	4.2	3.3
8.	WAVA-FM	4.4	4.1	5.6	20.	WOL-AM	1.2	1.2	0.9
9.	WMZQ-FM	4.3	4.1	3.7	21.	WYCB-AM	1.1	1.9	1.7
10.	WPGC-FM/AM	4.1	4.6	3.3	22.	WTKS-FM	1.0	0.8	0.6
11.	WTOP-AM	3.2	4.1	4.6	23.	WWDC-FM	1.0	0.9	0.8
12.	WGMS-FM/AM	3.3	2.3	3.2					

The Washington Post, "Washington Business" Section, February 4, 1985, at p. 3.

[5] 88 FCC 2d at 761 (concurring statement)(footnote omitted; emphasis in original).

> In plain terms, this is a contest for an FM license between two existing AM station licensees already operating in that same market. One applicant, Men-Mar, now has a fulltime AM station while the competing applicant, CJL, has only a daytime facility. This puts CJL at a strong competitive disadvantage, particularly during some periods of the winter when its daytime-only AM must go off the air before 5:00 P.M. FM stations are all fulltime and the decision here grants Men-Mar a *second fulltime facility* in the market; the hapless CJL is left where it started with *one parttime station*. To filch a sports metaphor—the score in advance of this contest was Men-Mar 1, CJL ½; after this contest, Men-Mar 2, CJL ½. Simple logic would seem to dictate that where one AM operator is already suffering under a hefty handicap for lack of nighttime authority which its competitor already has, we would leap at the opportunity to remedy the imbalance and award the FM (and the nighttime authority that accompanies it) to CJL and not exacerbate the current imbalance.

Correcting the Board's unhappy decision in *CJL*, the Commission found two critical faults: first, it said, the Board failed to give sufficient weight to the new voice that the applicant with daytime-only authority (CJL) would provide at night with a new FM station, 95 FCC 2d at 548; and, second, the Board failed to charge the applicant (Men-Mar) already having a fulltime facility in the area with an adequate diversity "demerit," in part, because of its 40% ownership interest in two California radio stations. *Id.*, at 549. The FM frequency at stake in *CJL* was in Menominee, Michigan, three-fourths of a continent away from California.

Although no previous case is precisely on point,[6] the Commission's *CJL* decision would appear to make this an *a fortiori* case. A grant to J.B. Broadcasting would provide — as did a grant to CJL — a new nighttime "voice" locally; and Gobbler's offsetting media interest is not 40% of two remote California radio stations, but 98% of a powerful television station now *directly* serving the community of Cuero, as it is required to do under

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[6] In a limp attempt to rationalize its decision by the citation of prior cases supervised by this "dissenter himself," *see ante* para. 4 & n.4, the majority — in a last-minute *ad hominem* footnote to which this note was added in response — especially annotates such precedent, suggesting it to be inconsistent with this instant dissent. Apart from the fact that this dissenter is in a better position to interpret the annotated precedent than the majority, the majority, nonetheless, recognizes that such precedent is largely inapposite to the facts at bar; in a late ray of candor lacking earlier in the decision, it ultimately concedes: "No Commission precedent precisely addresses this diversification comparison." *Id.*, at para. 14. Thus, the locus of any "hyperbolic zeal" or spareness of "analytical depth" may be found in the majority's preceding thirteen paragraphs, particularly its bloated claim— in the *admitted* absence of direct precedent— that J.B.'s diversification disadvantage "is clear beyond peradventure" and that J.B.'s attributable daytime-only, 500-watter "is of monumental comparative significance." *Id.*, at para. 4. The evidence of the majority's exaggeration in this regard is found just one paragraph later where, after examining its "precedents," the majority finds that "this case is less clear-cut" than prior decisions found by it to be analogous. *Id.*, at para. 5. Finally, despite the majority's puff that J.B.'s attributable diversification demerit has clarity "beyond peradventure" and is "monumental," it ultimately concludes that Gobbler should be awarded, much more modestly, "a slight to moderate diversification preference." *Id.*, at para. 18. Monumentally "slight to moderate"?

the Commission's licensing mandate. *See Stone* v. *FCC*, 466 F.2d 316 (D.C. Cir. 1972), where the court recognized:

> ... it is clear that a broadcast licensee has an obligation to meet the needs and interests of its *entire area of service. This is particularly the case with respect to television stations*, in view of the limited number of stations. Suburban and other outlying area are not cities of license, although their needs and interests must be met by television stations licensed to central cities.

Id., at 327-328 (footnote omitted; emphasis added).[7]

Even without perfect precedent, the Rosetta stone for interpreting the Commission's intent — as it is so often — is its seminal *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), our basic reference work. There, discussing our "primary factor" of comparative concern — diversification of control of the media of mass communications — the Commission established its diversification heirachy:

> Other interests in the principal community proposed to be served will *normally* be of most significance, followed by other interests in the ramainder of the proposed service area[5] and, finally, generally in the United States.

Id., at 394-395 (emphasis added). The Commission purposely used the term "normally" — not "always" — because the footnote (n.5) attending the phrase "in the remainder of the proposed service area" references our multiple ownership rules (*see supra* note 3). And, as noted, were Gobbler's television station merely a scant few miles closer to Cuero, its media market position would be considered so strong that its instant FM application might be barred. 47 C.F.R. §73.3555(b) Note 4. Hence, we are not here in a "normal" mode, where we can fly on automatic pilot; relativity is paramount, and the majority's claim that the comparison of a 155,000 watt TV station with a 500 watt daytimer is "misleading" (*see ante* para. 11) is bizarre.

The *Policy Statement* further explains its media diversification hierarchy by enumerating five criteria ((a)-(e)) for ranking other media interests. *Id.*, at 395. Criterion (b) holds that we shall consider an applicant's other media interests that:

> (b) are in, *or close to*, the community being applied for ... .

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[7] Thus, while Gobbler's television station is nominally licensed to nearby Victoria, its Grade B signal fully encompasses Cuero in its service area, and the Board has recently emphasized that "television stations ... are generally considered as providing 'an areawide rather than a localized service.' " *Cleveland Television Corp.*, 91 FCC 2d 1129, 1137 (Rev. Bd. 1982)(*quoting St. Louis Telecast, Inc.*, 22 FCC 625, 713 (1957)), *review denied*, FCC 83-235, released May 18, 1983 (Comm'n), *aff'd* 732 F.2d 962 (D.C. Cir. 1984). The Board, just last month, reiterated that: "The foremost example of a broadcast channel intended *expressly* to be a 'regional' rather than a local facility is, of course, a television station." *Debra D. Carrigan*, FCC 85R-26, released March 20, 1985 (Rev. Bd.)(emphasis in original), at n.16. How soon they forget.

Id., (emphasis added). Ergo, all applicant media interests that are in, or close to, Cuero should have here been compared much more rationally and proportionately by the majority; and not even a *literal* reading of the *Policy Statement's* relevant injunction can justify the obvious perversity of the result they have reached in this case.[8]

Accordingly, I respectfully dissent.

[8] The views expressed here reflect no consideration of the Commission's policy change favoring AM-daytime broadcasters in contests for local FM frequencies. *See Implementation of B.C. Docket No. 80-90*, FCC 85-124, released April 12, 1985. The policy change is irrelevant here for two reasons: (1) it is wholly prospective; and (2) J.B. needs no such preference to prevail over Gobbler.

FCC 84D-59

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
J. B. Broadcasting of Texas Cuero, Texas	MM Docket No.83-1273 File No. BPH-821026AQ
Gobbler Communications Company Cuero, Texas	MM Docket No.83-1274 File No. BPH-830214AA
For Construction Permit	

Appearances

John Bumgardner, *pro se*, on behalf of J. B. Broadcasting of Texas, Inc., Richard A. Helmick, Esq. (Cohn and Marks) on behalf of Gobbler Broadcasting Company and Charles Dziedzic, Esq. on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

Issued: August 22, 1984; Released: August 24, 1984

Preliminary Statement

1. The mutually-exclusive application of Gobbler Communications Company (GOBBLER) and J. B. Broadcasting of Texas, Inc. (J.B.) were set for hearing in *Designation Order # MM1122*, released December 8, 1983 under the following issues:

a) To determine pursuant to Section 73.1125, (Rule 73.1125; CFR 73-1125), whether good cause exists for the proposed location J.B.'s main studio outside the community of license;

b) To determine which of the proposals would on a comparative basis best serve the public interest; and

c) To determine, in light of the evidence adduced pursuant to foregoing issues, which of the applications should be granted, if any.

2. Originally there were three competing applicants. By *Memorandum Opinion and Order* FCC 84M-1212 released March 12, 1984 a buy-

out agreement between a third applicant Cuero Communications Company (Cuero) and Gobbler was approved which resulted in the dismissal with prejudice of the Cuero application.

3. *Memorandum Opinion and Order, FCC 84M-2436,* released May 25, 1984, granted J.B.'s petition for leave to amend its application and accepted its engineering amendment. J. B.'s engineering amendment stated that its main studio would be located within the boundaries of Cuero in compliance with Section 73.1125 of the Commission's Rules; administrative notice of such response is appropriate. Accordingly, the only remaining issues to resolve are the standard comparative issues.

4. A pre-hearing conference was held on March 1, 1984 and a hearing session was conducted on May 29, 1984. At the conclusion of the May 29, 1984 hearing session, the record was closed. Tr. 79.

5. Timely proposed findings of fact and conclusions of law were filed on July 19 and July 23, 1984 by Gobbler and J. B., respectively. Both parties by letters filed July 23 and July 26, 1984 again by Gobbler and J. B., respectively, advised they proposed no reply findings.

6. For the reasons setforth hereinafter, this as an Initial Decision SHALL GRANT the application of J. B. Broadcasting of Texas.

Findings Of Fact

A. Diversification

7. *J.B.* J.B., Texas corporation is owned 89.535% by Alice Jeanette Bumgardner 6.977% by Loring S. Parker and 3.488% by John B. Bumgardner.* J.B. Exhibits 1 and 4. J.B. is the licensee of daytime-only AM broadcast station KEWS, Cureo, Texas (there are no other stations currently licensed to Cuero, Texas). J.B. Ex. 3.

8. *Gobbler.* Gobbler, a Texas corporation, is owned 98% by Victoria Communications Corporation (VCC') and 2% Carl D. Young. VCC is the licensee of television broadcast station KVCT, Victoria, Texas. The airline mileage between Victoria and Cuero is 26 miles. The Grade B signal strength contour of KVCT encompasses approximately 598 of the 683 square miles within the 1.0 mV/m signal strength contour proposed by Gobbler and approximately 12,454 persons out of the total of 13,067 individuals residing within that area** Gobbler Ex. 4.

B. Integration of Ownership and Management

9. *J.B.* J.B. proposes John Bumgardner, a 3.488% owner, as general manager and he will be solely responsible for the construction and day-to-

* Alice Bumgardner of Loring S. Parker are the mother and grandfather, respectively, of John Bumgardner. J.B. Ex. 1.

** Thus, the KVCT Grade B single strength contour overlaps 87.5% of the area and 95.3% of the population within Gobbler's proposed 1.0 mV/m signal strength contour.

day operations of the proposed FM station. J.B. Exs. 1 and 4. Bumgardner has approximately 20 years of broadcast experience at both AM and FM stations. His past responsibilities involved duties in news, announcing, engineering and production; since 1976 until the present he has been general manager of Station KEWS, Cuero, Texas and has been responsible for all news, public affairs, public service and other programming broadcast by that station. Bumgardner also functions as the chief engineer for Station KEWS and holds a First Class Radiotelephone Operator's license. J.B. Ex. 2.

10. Bumgardner's civic involvement includes membership in the Cuero Lions International, the Cuero Turkeyfest Association, the Cuero Gobbler Booster Club and the Post M Travelers Protective Association of Cuero. Bumgardner is a past member of the Board of Directors of the Cuero Chamber of Commerce and Agriculture and has served on the Planning Commission for the Cuero Emergency Medical Service and the Planning Committee for the Cuero Retail Merchants Committee. Since 1979 until the present he has been serving as Public Information Officer for the Cuero-DeWitt County Civil Defense Program. J.B. Ex. 4.

11. *Gobbler.* Pursuant to VCC resolution of June 29, 1983 and a July 12, 1983 employment contract between Gobbler and Carl Young, VCC (which owns 98% of Gobbler's stock) has "voting control" over 51% of the issued and outstanding stock of Gobbler and Carl D. Young (who owns 2% of Gobbler's stock and is a corporate Vice President) potentially may have "voting control" over 49% of Gobbler's stock.*** VCC has designated Dewey T. Acker to vote its stock interests in Gobbler; Acker is the President, Director and 7.29% owner of VCC and the President and Director of Gobbler. Gobbler Exs. 1 and 4.

12. Carl D. Young, a black male, will be the full-time (minimum of 40 hours per week) station manager with day-to-day responsibility for management and operation of the proposed Cuero FM station; Gobbler's Board of Directors will establish policies and Young will implement those policies subject to the direction of Dewy T. Acker, the proposed part-time general manager. Young resides in Victoria, Texas and plans to commute to Cuero; the drive time between Victoria and Cuero is less than 30 minutes one way. Gobbler Ex. 2.

13. Young has approximately five years of past broadcast experience in both radio and television and has worked primarily in the areas of announcing, maintenance and engineering. Gobbler Ex. 3. While on active duty with the United States Air Force from 1977 through 1979, Young graduated from the electronics school at Kessler Air Force Base and completed Air Force Career Development courses in advanced electronic

*** Gobbler gave Young a 2% ownership interest with an option to acquire an additional 47% interest over the term of a five-year employment contract.

theory (with recognition for outstanding achievement), radio/television broadcasting and solid state devices. In 1979 he graduated from Elkins Institute of Radio Broadcasting and in 1982 completed the broadcasting/engineering course at Cleveland Institute of Electronics. Gobbler Ex. 6.

14. In addition to his duties as full time station manager of the proposed Cuero FM station, Young will continue to be the chief engineer of television station KVCT, Victoria, Texas and will be responsible for supervisory oversight of the technical operations of that station to insure compliance with the Commission's Rules; Gobbler anticipates that these oversight responsibilities will entail a nominal (5 hours per week or less) amount of Young's time. Gobbler Ex. 2; Tr. 69-71.

15. Dewey T. Acker will be the part-time (minimum of 20 hours per week) general manager of the proposed Cuero FM station and will provide management oversight and policy direction to Carl Young who, as noted above, will be responsible for day-to-day operation and management of the proposed station. Acker will continue as full-time President and General Manager of television station KVCT, Victoria, Texas. Acker resides in Victoria, Texas. Gobbler Ex. 2.

16. Acker has approximately 20 years past broadcast experience in both radio and television; at various times he has had responsibilities as an announcer, technical director, program director, news director, sales account executive and, for the past eight years, has been general manager of station KVCT(TV), Victoria, Texas. Gobbler Ex. 3

C. Auxiliary Power Equipment

17. Gobbler proposes to use emergency power generation equipment of its transmitter and for its studio and STL facilities. Gobbler Ex. 5.

D. Areas and Population

18. Both J.B. and Gobbler have stipulated on the record that there are no meaningful distinctions between their respective technical proposals and, thus, any differences in areas and population served by the applicants are no decisional significance. Tr. 78-79

Conclusion

E. Diversification

19. Because of the pervasive quality of Gobbler Victoria, Texas television signal in the Cuero area — admittedly 87.5% of the average area and 95.3% the population within 1.0 mV/m signal strength of its proposed Cuero AM station — even with J. B.'s actual presence in the community of Cuero with its FM station, the diversification attributes of the applicants as to discernible, thus real differences are at best amorphous. Gobbler's suggestion that it is to be preferred on the notion of "a new voice" in the Cuero community is an equally and vastly strained thesis. Simply, it is and

has been in the Cuero community as a veteran "voice" with its significant over 95% presence. Thus, diversification between the parties is virtually equal and no meaningful preference can or will be accorded either. *Cf. Julie B. Miner v. FCC* Case #78-1903, U.S. Cir. Ct. (D.C.) (1980), generally and at p. 12.

F. Integration

20. Fashioning or designing the most attractive, thus creditable, integration of ownership with management is a common phenomenon in the quest for comparative choice; it is not only permissible in the sometimes Never Never Land of comparative selection, it may very well be necessary, if not encouraged. Here, having concluded that the primary objective of the maximum diffusion of control of mass media cannot be the touchstone for decisional disposition, one must seek deeper depth of rational choice in the applicants' designs of quantitative as well as qualitative attributes of the other objective in the *Policy Statement of Comparative Broadcast Hearings*, 1 FCC 2d (1965), who or which applicant would provide the best practical service to the public.

21. Gobbler proposes to integrate its ownership/management with its 2% owner as full-time station manager, a black male. Gobbler's proposed general manager a 7.29% owner of Gobbler's parent company VCC (which in turn owns 98% of Gobble) will have less than full-time participation — 20 hours part-time — cannot and will not be credited with cognizable ownership/management attributes, his participation being sharply below the required substantial amounts of time on a daily basis. This, notwithstanding the general manager's "voting control" 51% of Gobbler designated by VCC, Gobbler's parent of which he is also President, Director and 7.29% owner. Also Gobbler's proposed station manager, a black male, presently a 2% owner of Gobbler and with VCC designated "voting control" of 49% of Gobbler's stock, in spite of the resourceful, if not, artfully designed proposed corporate structure and operation of Gobbler, is, as with the proposed general manager, little more than a surrogate of the VCC, the real owner of Gobbler. Thus, the 2% owner full-time station manager can be credited no more than 2% integration credit. And it is not as Gobbler would have it, that the "voting control," is the paramount concern *versus* "legal control"; reason if not common sense, suggests, indeed compels, rejecting shadow over substance. Both the general manager and the station manager remain principal employees of VCC (Gobbler's 90% plus owner) as President and Chief Engineer, respectively; and will continue in their principal employments were Gobbler to be granted the license here. One can hardly imagine the occasion where the independence of the"voting control" of either the general (51%) or station

manager (49%) would survive the rejection of the direction or stated wishes of VCC.

22. Further, Gobbler, in citing *High Sierra Broadcasting, Inc* FCC 83R-101, released December 22, 1983, *Communications Properties, Inc.*, 92 FCC 2d 45 (Rev. Bd. 1982) and others in support of its thesis concerning "voting control" misconceives and misapplies the holdings in those cases. In *Communications*, the corporation which was the applicant, was owned by two individuals 61.7% and 38.3%; under a shareholding agreement the 38.3% owner was given a voting interest of 50%; true ownership was not in dispute there. Here, an employee with no interest in the parent corporation of the applicant holds a 2% interest in the subsidiary applicant, with an option to purchase an additional 47% in the overall span of five years. Indeed, how widely held VCC is an unknown; nevertheless, the person given 51% "voting control" in the subsidiary applicant who happens to be President and a Director of the parent corporation owns but 7.29% of the parent. The theory of "voting control" surely must connote some rational notion of unfettered independence on the part of the "controller" else the "controller" is more than "controlled," a mere surrogate. An employee albeit of the level of a Chief Engineer, is always subject to the will of the employer under the ancient legal norm of master and servant.

23. Were one to accept the strained Gobbler thesis, "voting control" might very well be assigned to third persons, indeed utter strangers, who might best be molded and fashioned to achieve the various nuances of the most successful criteria underlying the objective of integration of ownership with management. At first blush, a novel and inventive concept, but hardly comporting with ordinate application of the traditional and established law of private corporations; a parent corporation, especially as here, a 90% plus parent is the indisputable master of and over its legal child or servant, Gobbler. Even, for example, a "blind" or indeed an irrevocable trust of the "voting control" could not save the day here, if only for the reason of the total dependency, as employees of Gobbler's proposed general and station managers.

24. J.B. will integrate John Bumgardner, a 3.480% owner as full-time general manager, a modest ownership but at least greater than Gobbler's 2% full-time station manager. Declining to lend substance to the "voting control" mechanism of Gobbler's proposed general manager and station manager, J.B. must prevail quantitatively under the criteria sustained within integration of ownership and management. Qualitative enhancement of Gobbler's 2% owner/station manager can be credited by his minority status as a black person. J.B.'s local residence, broadcast experience, and civic activities of its 3.4% plus owner full-time general manager would qualitatively enhance its comparative posture as matters

of abiding importance and significance, albeit minor as to broadcast experience.

G. Auxiliary Power Equipment

25. Gobbler proposes to install auxiliary power equipment at the studio and transmitter and is entitled to a very slight preference on this factor. *See Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667, 6 RR 2d 861 (1966).

H. Areas and Population

26. As noted earlier, there being a stipulation that there is no substantial difference between the technical proposals of the applicants in this proceeding, neither Gobbler nor J.B. is entitled to a coverage preference.

27. As is often the occasion in comparative broadcast proceedings, this is another close case. Yet under the *Policy Statement, supra* and abiding precedent from its genesis, J.B. premised on its greater quantitative integration of ownership with management and its slightly greater qualitative enhancement of local residence, civic activities and broadcast experience must prevail. Gobbler's lesser quantitative attributes and cognizable qualitative attributes of minority and broadcast experience would and could not offset the compelling choice here. This must be so even were one to pass over further inquiry into and analysis of Gobbler's proposed 2% owner station manager's obligation as Chief Engineer at its Victoria, Texas television station — "nominal 5 hours per week or less" says Gobbler — and his daily drive from Victoria to Cuero "less than 30 minutes one way."

For the foregoing reasons, the application of J.B. Broadcasting of Texas may be AND IS HEREBY GRANTED; that being so, the application of Gobbler Communications Company for the same facilities must be AND IS HEREBY DENIED.[1]

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

JAMES F. TIERNEY, *Administrative Law Judge*

[1] In the event exceptions are not filed within *30 days after the release of this Initial Decision* and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Jurisdiction of FCC, Generally
Satellite Earth Station
Zoning

Notice of Proposed Rulemaking adopted to preempt state and local zoning regulations to the extent that they have the effect of unreasonably discriminating against satellite receive-only antennas in favor of other communications facilities, and lack a direct and tangible relationship to valid, demonstrable and clearly articulated health, safety or aesthetic objectives and do not constitute the least restrictive method available to accomplish such objectives.
—*Local Zoning Regulations*
CC Docket No. 85-87

FCC 85-144

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations	CC Docket No. 85-87

NOTICE OF PROPOSED RULEMAKING

Adopted: March 28, 1985; Released: April 1, 1985

BY THE COMMISSION: COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT.

I. Introduction

1. The Commission has before it a petition filed by United Satellite Communications, Inc. (USCI) requesting, pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, a Declaratory Ruling preempting local zoning regulation of satellite receive-only earth stations. Oppositions and comments have been received from various parties.[1] Because the

[1] American Radio Relay League (League) has filed a similar request for a ruling preempting zoning regulations of amateur radio towers. Although the League requested consolidation of its petition with the USCI matter (USCI opposes consolidation), we have elected to consider these petitions separately. Those concerns raised by Amateur Radio operators will be addressed in our future action on that request in the proceeding entitled PRB-1.

nature of the preemption requested in this proceeding deals with matters of significant local concern and because of the limited record compiled thus far, we have determined that the most appropriate way to respond to USCI's petition is to issue a Notice of Proposed Rulemaking pursuant to Section 1.411 of the Commission's rules, 47 C.F.R. § 1.411. The purpose of this notice is to propose the following rule:

> State and local zoning or other regulations that discriminate against satellite receive-only antennas in favor of other communications facilities are preempted unless they have a direct and tangible relationship to reasonable, valid, demonstrable and clearly articulated health, safety or aesthetic objectives and constitute the least restrictive method available to accomplish such objectives.

We solicit public comment on this proposal as described in greater detail herein.

II. Background

A. USCI Petition

2. In its petition for a declaratory ruling, USCI has requested the Commission to issue what it terms a limited preemption of state and local regulations when such regulations

1) lack a direct and tangible relationship to legitimate and neutral zoning or public health and safety considerations,
2) interpose requirements that frustrate the reception of satellite-transmitted signals, and
3) are contradictory to the preeminent federal interests in establishing and fostering interstate satellite program delivery services to the public.

3. The petition cites a Chicago ordinance as an example of an unacceptable zoning regulation. This law requires that an application for a construction permit for a satellite receiving station be processed as a "planned development," subjecting it to the review of three governmental agencies and a public hearing and requiring a $100.00 application fee. USCI also alleges that Chicago's ordinance was enacted for the purpose of protecting the cable industry in that city and refers to statements made to that effect by a city council member in the course of hearings on the ordinance.

B. Comments/Issues Raised

4. Initial comments and reply comments have been received in response to the USCI petition. In general, satellite industry representatives responded in favor of Commission preemption and stressed the necessity for access to antenna facilities. Local government representatives opposed preemption stating that it was unnecessary and an unwarranted federal interference in traditionally local concerns.

5. Satellite Television Industry Association, Inc. ("SPACE") supported Commission preemption of "unreasonable" zoning restrictions "which interfere with the expansion of home satellite antennas."[2] Attached to SPACE's comments are copies of other ordinances with it claims are examples of unreasonable satellite regulations and which apply zoning restrictions to the construction of antennas. Many of these relate to antenna size and bar the use of all but the smallest antenna (*e.g.*, one meter). Others require set backs or screening, installation only in certain areas or yard locations, high application fees or expensive engineering data, or consent by all affected neighbors in a residential area. SPACE argues that there should be no diameter restrictions permitted although local governments have the power to regulate for health and safety reasons, and little aesthetic regulation should be permitted. It also urges that any size considerations should be based on 4/6 GHz equipment instead of DBS antennas[3] because, according to SPACE, the future of the latter service is uncertain.[4]

6. Other supporting comments suggest similar or broader preemptive action. American Satellite suggests extending preemption to all local regulations which create obstacles for earth station installations. M/A-Com, Inc. asserts that a Commission order should state that local zoning must not discriminate between services, and that size of the antenna is an appropriate criteria for judging the reasonableness of regulations. RCA American Communications, Inc. states that preemption is consistent with prior Commission rulings and urges preemption of regulations which restrict the delivery of satellite services to the public. Equatorial Communication Services and Contemporary Communications Group urge preemption of all uses of earth stations whether industrial or residential, for video or data services, and Atlantic Satellite Communications, Inc. requests preemption of regulation of transmit facilities. Direct Broadcast Satellite Television Association, and Direct Broadcast Satellite Corp. voice concerns regarding the effect of restrictive and burdensome regulations on the development of direct broadcast services. Satellite Television Corp. (STC) argues that the Commission can rationally distinguish between smaller DBS facilities and larger satellite antennas "commonly known as 'back yard earth stations'" which it claims are not intended for direct

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[2] SPACE's pleading was titled "Petition for Declaratory Ruling and Comments." It is being considered as comments herein. USCI opposes consolidation with SPACE's petition, but the nature of the issues raised and relief sought by both parties support considering this pleading as comments herein.

[3] Because of technological differences, antennas used in Direct Broadcast Service (DBS) can be much smaller than the typical "home earth station" designed to receive programming transmitted in the 4/6 GHz frequency band.

[4] Both SPACE and M/A-Com, Inc. cited a large increase in the number of home earth stations in use as evidence of the economic strength of the home earth station market.

reception of signals and are thus not an integral part of a telecommunications network.[5] Channel One, Inc. urges preemption of all non-health and safety related local regulations.

7. State and local government representatives oppose preemption. New York City states that federal preemption will result in burdening the courts or the Commission with the consideration of all local ordinances, that preemption cannot be justified on this record because there is no evidence of restriction of satellite delivered services, and that there are adequate local remedies available as alternatives to preemption. The American Planning Association stresses the upholding by state courts of aesthetic zoning regulation and the availability of other remedies, and states that in preempting the Commission would be substituting its own judgment for that of local legislatures. The National League of Cities argues against preemption because 1) it would be an improper exercise of federal jurisdiction, 2) the Commission does not have the power to preempt, 3) national and local interests can be accommodated without preemption and 4) preemption would impose burdens on the Commission and on local governments. The National Association of Counties stresses the strong local interest in the exercise of police power. The North Area Cable Television Authority opposes preemption on the basis of its assertion that zoning matters are appropriately regulated by the state.

III. Discussion

8. This proceeding addresses two primary questions. Initially it must be determined if this Commission has the authority to preempt any zoning regulation. If so, it then must be determined what type of restrictions should be preempted. Finally, we must consider how to implement any preemption that might be adopted. Despite the strong and traditionally local nature of zoning power, it is our tentative conclusion that the Commission does have the authority to preempt zoning regulations when they act as obstacles to the federal objective to promote the growth of satellite delivered services. We do not propose to rule on individual ordinances. Instead, we believe announcing general policy for use by state and local officials will be sufficient to ensure that federal objectives are not frustrated.

A. The Commission's Preemption Authority

9. Federal preemptive power may be exercised when:

(1) Congress has expressed a clear intent to preempt state law;

[5] USCI in reply comments agrees with this assertion and Atlantic Satellite Communications, Inc. objects because such a standard would be discriminatory and would create a "natural monopoly" for DBS services.

(2) Congress has legislated comprehensively to occupy an entire field of regulation; or

(3) compliance with both state and federal law is impossible or the state regulation stands as an obstacle to the accomplishment of congressional purpose.[6]

10. This Commission has licensed carriers to provide domestic satellite service across the United States. Various types of businesses transmit their products and programming over these satellites and without satellite antennas to receive these transmissions, the services are useless.[7] In addition, recent amendments to the Commissions Act, 47 U.S.C. § 705, provide that unless the sender has established a marketing system an individual using a satellite antenna at his dwelling may freely receive unscrambled satellite cable programming without incurring liability for unauthorized interception. This provision implicitly encourages entities transmitting unscrambled programming over satellites to set up public marketing systems which sell cable programming to the public. In enacting this legislation, Congress wished to ensure that Americans who did not have access to cable programming would be able to obtain such programming.[8] Individuals cannot take advantage of such marketing systems if they cannot set up receiving antennas with a minimal amount of interference from the state and local governments. Thus, excessive state and local regulation of satellite antennas interferes with a conditional right to receive programming via home earth stations. When state regulations are unreasonably interfering with or frustrating this right or the provisions of the Commissions Act or Commission rules, as described above, preemption is warranted.[9]

11. This Commission has preempted state regulation that interfered with or impeded the distribution of interstate communications. For example, we preempted state regulation that sought to classify as cable systems Master Antenna Television Systems carrying Multi-Point Distribution Service (MDS) transmitted programming. In that case, after noting that these services were interstate in nature,[10] we found that the state's attempt to regulate presented an obstacle to the accomplishment of

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[6] Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984). *See also* Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board, 104 S.Ct. 2518 (1984); Florida Avocado Growers v. Paul, 373 U.S. 132 (1963); Hines v. Davidowitz, 312 U.S. 52 (1941).

[7] *See* Earth Satellite Communications, Inc., 95 FCC 2d 1223, 1232, (1983).

[8] *See* 130 Cong. Rec. H10439, H10443 (remarks of Representatives Wirth and Gore, respectively).

[9] Fidelity Federal Savings and Loan Assoc. v. De La Cuesta, 458 U.S. 141 (1982); Hines v. Davidowitz, 312 U.S. 52 (1941). *See* Virginia State Corporation Commission v. FCC, 737 F.2d 388 (4th Cir. 1984).

[10] The Commission pointed out that the station involved was part of a national network interconnected by a domestic communications satellite and that non-federal limitation of receive points could hamper interstate development of the service. In the Matter of Orth-

Congressional objectives in promoting interstate commerce.[11]

12. In a recent order in *Earth Station Satellite Communications, Inc.*,[12] we preempted a state's attempt to apply cable regulations to Satellite Master Antenna Television Systems (SMATV). We emphasized the importance of a free market development of satellite delivered communications stating "it is clear that local prior approval requirements are inconsistent with national policies in these areas."[13] The opinion noted that the state certification requirement in question would result in delay or termination of service to the public.[14] The order left open the possibility of some local regulation of SMATV service such as zoning or safety requirements provided they did not interfere with or inhibit interstate transmissions.

13. On reconsideration, we affirmed the decision to preempt but declined to extend our order to grant a SPACE request to preempt local zoning ordinances that interfere with the erection of receive-only earth stations on residential property. We stated that the scope of the initial proceeding did not include review of zoning regulations and that petitioners should raise this issue in a separate proceeding "if they can show that local jurisdictions are deliberately 'zoning out' communications equipment for purposes of restricting national communications systems rather than for clearly acceptable purposes of local concern."[15]

14. On appeal, the Court of Appeals found that its review was limited to two issues, namely whether the Commission had authority to preempt and whether this authority was exercised reasonably. It affirmed the Commission concluding that preemption was consistent with prior Commission policy and was a " 'reasonable accommodation of conflicting policies that are within the agency's domain.' "[16] Distinguishing the SMATV services involved from traditional cable services because the latter involved the use of public rights of way and was thus subject to local control, the Court noted that this Commission has retained exclusive control over the licensing of satellites. The Court found that this

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O-Vision, Inc., 69 FCC 2d 657, 660, 669 (1978), *aff'd sub nom.*, New York State Commission of Cable Television v. FCC, 669 F.2d 58 (2d Cir. 1982).

[11] 69 FCC 2d at 669. This preemption was upheld on review. New York State Commission on Cable TV v. FCC, *supra* note 10.

[12] 95 FCC 2d 1223, *recon. denied*, FCC 84-206, *aff'd sub. nom.* New York State Commission on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984).

[13] *Id.* at 1232. The Commission cited In Re Regulation of Domestic Receive-Only Satellite Earth Stations, 74 FCC 2d 205 (1979), for the proposition that it favored the least regulation possible, consistent with satellite policies, in respect to earth station ownership.

[14] *Id.* at 1234.

[15] Earth Satellite Communications, Inc., FCC 84-206 at 3 (May 14, 1984).

[16] New York State Commission on Cable Television v. FCC, 749 F.2d 804, 808 (D.C. Cir. 1984) *citing* Crisp, 104 S.Ct. at 2101.

Commission acted reasonably in the exercise of our authority to preempt.[17]

B. Nature of Local Regulation

15. Although the proper focus in a preemption action is not the relative importance to the states of their own laws,[18] it is incumbent on this Commission to take note of the traditionally local character of zoning regulation.[19] The parties filing comments opposing USCI's request have stressed this. They have also asserted that the Commission lacks authority to regulate local zoning matters and have raised the question of its ability to act as a "super zoning board" in reviewing the reasonableness of local regulations. Opponents have cited the fact that alternative remedies exist to individuals wishing to challenge actions taken pursuant to local zoning powers.

16. We recognize the strong local interest in zoning regulation. Such regulation has been upheld as a valid exercise of state police power where it is reasonable and bears a rational relationship to permissible state objectives such as preservation of the community's health and safety.[20] Even the promotion of purely aesthetic community values has been upheld under certain circumstances.[21] In addition, this Commission does not wish to assume the position of a national zoning board or substitute its judgment for that of local authorities by reviewing a myriad of individual zoning decisions. However, we do believe that the record established thus far indicates an existing problem and that it is within our authority to issue guidelines to insure that federal communications objectives are not frustrated.

C. Frustration of Federal Objectives by State Zoning Regulations

17. The purpose of this notice is to propose a preemption policy that recognizes local interests while insuring that federal policies are not

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[17] *Id.* at 812-15. In this case the petitioners argued that preemption was contrary to the federal policy as opposed to preemption proponents in the USCI proceeding who assert that state policy conflicts with federal goals. Id. at 808.

[18] Free v. Bland, 369 U.S. 663 (1962). *See also*, Fidelity Federal Savings and Loan Assoc. v. De La Cuesta, 458 U.S. 141 (1982).

[19] *See* Columbia Plaza Ltd. Partnership v. Cowles, 403 F.Supp. 1337 (D.D.C. 1975).

[20] Village of Belle Terre v. Borass, 416 U.S. 1 (1974); Village of Euclid v. Ambler Realty, Co., 272 U.S. 365 (1926).

[21] City Council of Los Angeles v. Taxpayers for Vincent, 104 S.Ct. 2118 (1984). The Court has required careful scrutiny of the breadth of such local restrictions on first amendment rights, however, and has refused to uphold ordinances based on aesthetic values which go beyond valid time, place and manner speech restrictions and which fail to leave open alternate channels for expression of the restricted communications. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). *See also* Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981); Erzoznick v. City of Jacksonville, 422 U.S. 205 (1975).

frustrated. We seek to compile a record on the accuracy of our analysis of the problem, the interests involved, and the efficacy of our solution. The Chicago ordinance cited by USCI appears to be the type of local regulation which would be subject to preemption under our proposed ruling.[22]

18. The Chicago ordinance specifically exempts amateur radio towers and does not appear to apply to conventional home television antennas while it specifically subjects satellite receiving equipment to its rigorous provisions. The ordinance seems to single our satellite antennas because of their status, and not because of health and safety concerns regarding antennas in general such as windloading regulations. Nor does it apply clearly articulated aesthetic criteria such as screening or offset requirements. Thus, there appears to be no reasonable health and safety or aesthetic basis for the distinction in the city's ordinance.

19. The Chicago ordinance also imposes significant burdens on an individual attempting to obtain a construction permit for a single antenna. These include a $100 non-refundable application fee, a review by three separate city agencies and a public hearing, the same procedure that would be applied to an application to construct an airport, a hospital, or a large residential subdivision. These restrictions appear to go beyond those necessary to assure the legitimate health, safety or aesthetic values of the community.

20. USCI has submitted as part of this record transcripts of city council hearings regarding this ordinance. These transcripts indicate that at least one Council member who voted for the ordinance believed that its purpose was to protect the cable franchise in that city. We do not believe that regulations intended to afford a competitive advantage to one type of communications service to the disadvantage of another are in accord with our policies of providing for growth of all national communications facilities.

21. Despite these tentative conclusions regarding the Chicago ordinance, we recognize that this Commission should not unduly interfere with the legitimate affairs of local governments when they do not frustrate federal objectives. Communities have the right to maintain a certain quality of life for their citizens with respect both to their health and safety and to the aesthetic quality of the locality. Any final order preempting local zoning must be carefully and narrowly drawn and give effective guidance to the communities in carrying out their land use planning power. The following discussion addresses the various proposed preemption standards.

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[22] We have also considered the local ordinances submitted by SPACE and although we will not review them in detail, we conclude that some would be preempted by our proposed rule.

D. Proposed Rule

22. Neither USCI nor the other support parties advocate a total preemption of all local zoning regulations of satellite antennas. We agree that a complete preemption in this case would be an unwarranted federal intrusion into legitimate state and local matters. Thus, if we determine that a limited preemption is appropriate, a clear set of guidelines must be formulated in order to give state and local governments notice of the extent of their permissible power to regulate. We encourage parties to comment in this regard.

1. Size Considerations

23. Those parties commenting in this proceeding have made several suggestions as to the nature of an appropriate limited preemption. One such suggestion is that the Commission establish a criteria based on the size of the proposed antennas. For example, M/A-Com, Inc. has proposed a limit of ten feet in residential areas and 12 feet in commercial areas below which local regulation would not be permitted absent a strong demonstration of the necessity for greater restriction by the local government. M/A-Com, Inc. indicates that this standard would draw the "clear bright line" needed to give guidance to local communities and to avoid the possibility of Commission review of numerous local ordinances. M/A-Com, Inc. also emphasizes that any local regulation must be non-discriminatory as to antenna type. STC argues that an order distinguishing between DBS antennas and home earth stations would be appropriate.[23] SPACE, on the other hand, urges the preemption of all local diameter restrictions.[24]

24. Antenna size may be a relevant factor in achieving safety and aesthetic objectives. Smaller antennas would seem to present less local concern from both aesthetic and safety points of view. It thus may be possible to establish certain presumptions related to size which would be based on the lack of strong local interest in regulating smaller facilities. However, because one of our main objectives in our proposed preemption order is to eliminate arbitrary governmental discrimination among communication facilities, we would be reluctant to promulgate a rule which might have the effect of promoting such discrimination. In addition, antenna size varies depending on usage and rapidly changing technology will affect any technical basis for a size distinction. We have thus not included size considerations as a regulatory criteria. However, we encourage parties advocating this approach to submit evidence supporting their position for consideration in our final decision.

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[23] *See* para. 6.

[24] *See* para. 5.

2. Aesthetics

25. Another suggested approach to a preemption ruling is that the Commission ban all local zoning regulations enacted for aesthetic purposes. SPACE and Channel One, Inc. advocate this suggestion.

26. We have rejected this proposal because we believe that a local community has a strong legitimate interest in regulating for aesthetic purposes as long as that regulatory action is taken on a neutral basis without an unreasonably discriminatory effect. As previously discussed herein, local communities have the right to enact ordinances which will protect the aesthetic values of citizens and this Commission should not interfere with this right provided that federal objectives are not being frustrated. Thus, we feel that ordinances requiring certain types of screening or placement should be permissable when applied in a proper context and on an equitable basis to all facilities. Again, however, we encourage commenters to offer evidence regarding this issue.

3. Extension to other antenna uses

27. Other commenting parties have urged expansion of a preemption ruling to antennas other than receive-only antennas used in residential areas for video reception.[25] It is our intention to direct our proposed rule to receive-only satellite earth stations without regard to usage. We believe that there are additional considerations or determinations that must be made with respect to transmitting antennas that are being addressed in other proceedings and that would unduly broaden the scope of the proposals made herein.[26] Although we would accept comments on this issue, our present intention is to limit consideration to receive-only antennas.

4. USCI's Proposal

28. Another option before the Commission is the specific one proposed by USCI.[27] The proposed language does not directly deal with ordinances which unreasonably discriminate against satellite facilities in favor of other communications facilities.[28] An example of this is the Chicago ordinance which exempts amateur radio towers and does not appear to apply to UHF or VHF television antennas. In addition, USCI's language would need future Commission clarification and could engender further

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[25] *See, e.g.*, Comments of Atlantic Satellite, Equatorial and American Satellite.

[26] *See e.g.*, Gen. Docket No. 79-144 in which the Commission is considering amending its rules to include the authorization and licensing of transmitting equipment emitting excessive microwave radiation as "major actions" subject to the Commission's environmental processing standards. In addition, PRB-1, *supra* note 1, will address the preemption request filed by the American Radio Relay League.

[27] *See* para. 2, *supra.*

[28] *See* Comments filed by Satellite Television Corp.

Commission involvement.[29] Therefore, we do not believe USCI's proposal is the appropriate standard.

5. Rule Proposed Herein

29. We feel that the rule proposed herein is sufficiently concrete and addresses some specific areas not included in the USCI request. In particular, it prohibits unreasonable governmental discrimination among antenna facilities. At the same time, the proposal clearly protects legitimate interests in regulating health, safety and aesthetic values of local communities.

30. The proposed rule accommodates both the federal interests in the Commission's open entry satellite policies and local interests in providing reasonable zoning protection for residents. This proposal is offered in response to evidence presented which indicates that local zoning regulation may be unreasonably interfering with the installation of satellite antennas, thus creating an obstacle to the federal goal of providing for the expansion of satellite delivered services. The Commission has made an initial determination that a limited preemption may well be warranted. Our proposed rule is designed to provide general guidance to individual antenna users and to local communities. It is not our intention to act as a national zoning board or to review individual ordinances. The rule would prevent communities from exercising their zoning power to discriminate against satellite receive-only antennas. It also leaves with local governments full authority to enact reasonable and neutral regulations which would protect the legitimate health, safety and aesthetic concerns of citizens. It thus accommodates both state and federal interests and fulfills the mandate of this Commission to ensure the growth of effective interstate communications.

IV. Conclusion

31. Authority for this proposed rulemaking is contained in Sections 151, 303, 403 and 705 of the Communications Act of 1934, as amended.

32. The major objective of this proceeding is to propose a policy implementing the Commission's preemption of local zoning regulation which discriminates against satellite antennas and which is not related to valid health, safety or aesthetic regulation and is not the least restrictive method of accomplishing such regulation.

33. Comments on all aspects of the proposed ruling are encouraged, but commenters should avoid merely repeating comments already submitted.

34. As required by Section 603 of the Regulatory Flexibility Act, we have prepared an initial regulatory flexibility analysis (IRFA) of the

[29] *See* Comments filed by M/A-Com, Inc.

expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. Any such comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis.

35. For the purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comment/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or member of the Commission's staff that addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of the presentation to the Commission Secretary for inclusion in the public files. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comment by the proceeding must prepare a written summary of that presentation. On the day of the oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the rules, 47 C.F.R. § 1.1231.

36. Accordingly, IT IS ORDERED that interested parties may file comments according to an expedited schedule pursuant to Section 1.415 of the Commission's rules on or before May 8, 1985 and reply comments on or before May 23, 1985. In addition to consideration of all relevant and timely comments, the Commission may take into consideration information not contained in the comments provided that evidence of the existence of such information including its nature and sources is placed in the public record and provided that the fact of the Commission reliance on such information is noted in any order taking final action in this matter.

37. IT IS FURTHER ORDERED that pursuant to Section 1.419 of the Commission's rules, an original and five copies of all comments, replies, pleadings, briefs or other documents shall be filed with the Commission. Copies of all filings will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

38. IT IS FURTHER ORDERED that the Chief, Common Carrier Bureau, has delegated authority to require the submission of additional information, make further inquiries and modify the dates and procedures if necessary to provide for a fuller record and more efficient proceeding.

39. IT IS FURTHER ORDERED that the Secretary shall cause this Notice of Proposed Rulemaking and the attached Initial Regulatory Flexibility Analysis to be published in the Federal Register.

40. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief, Counsel for Advocacy of the Small Business Administration in accordance with Paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. et seq.).

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Initial Regulatory Flexibility Analysis

I. Reason for Action

In this proceeding the Commission seeks to develop a record and to elicit comments on a proposed rule preempting certain local zoning regulations of satellite receive-only earth stations. This action is taken in response to a petition for declaratory ruling and associated comments which indicate the possibility that local zoning restrictions may be frustrating the Commission's objective to promote the expansion of satellite services in the public interest.

II. Objective

The Commission's objective in proposing this rule is to ensure that local zoning regulations do not act as an obstacle to the accomplishment of federal communications objectives.

III. Legal Basis

The legal basis for this action is found in 47 U.S.C. §§ 151, 303, 403 and 705.

IV. Small Entities Affected by the Proposed Rule

The proposed rule will have an effect on local government jurisdictions of all sizes as it may impose some limits on their power to enact zoning legislation related to satellite receive-only antennas. Small businesses selling receive-only antennas also may be affected in that their ability to do business in a competitive market may be enhanced by preemption. In addition, the ruling would afford guidance to local jurisdictions and to individual citizens regarding the acceptable limits of local governmental action.

V. Recording, Recordkeeping and Other Compliance Requirements

This action will not create any new reporting or record-keeping requirements.

VI. Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rule

There is no overlap, duplication or conflict.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives

Because there appears to be a significant conflict between some local zoning regulations and the use of satellite receive-only facilities, the only effective alternative appears to be a limited preemption by the Commission. Failure to do so may lead to restrictive zoning regulations limiting the ability of small businesses to sell receive-only earth station equipment in competition with other transmission media. A federal statement of preemption criteria may reduce uncertainty in the areas for both local governments and small businesses and individuals reducing unnecessary litigation.

Re: Notice of Proposed Rulemaking Regarding Preemption of Local Zoning Regulation of Satellite Receive-Only Antennas.

Separate Statement of
Commissioner Mimi Weyforth Dawson

My preference with regard to the Commission's preemption authority would not be to initiate a potentially time-consuming rulemaking proceeding to inquire into the Commission's jurisdiction. I think that the record before us is more than adequate, and I am not sure what another round of comments will gain other than a delay in the ultimate resolution of the issues raised in the subject request for declaratory ruling. Moreover, I do not view the procedure chosen by the Commission in this particular instance as indicating that a notice-and-comment rulemaking is a legal predicate to a decision regarding the Commission's ability to preempt local regulation which has the effect of thwarting federal policy.

However, given the relatively brief comment period allowed in this proceeding as well as the Bureau's commitment for expeditious treatment of this docket, I am willing to support a notice of proposed rulemaking.

In addition, in the comments which are filed in this proceeding, I will be particularly interested as to whether the Commission's proposed preemption should include a similar provision to that contained in Section 3 of S.R. 35, recently introduced by Senator Goldwater. It seems to me that the Commission may well be interested in clearly preempting local restrictions which are intended to or do in fact "protect from competition or . . . provide a competitive advantage to any [non-satellite] means" of delivery or reception.

Common Carrier, Interconnection
National Defense

Commission adopted Report and Order that (a) established a timetable for the implementation of equal access by independent telephone companies and (b) recommended proposed institutional arrangements for joint planning among carriers for conventional and NSEP communications facilities planning.
—*MTS/WATS Market Structure*
CC Docket No. 78-72 (Phase III)

FCC 85-98

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
MTS and WATS Market Structure Phase III:	CC Docket No. 78-72, Phase III
Establishment of Physical Connections and Through Routes among Carriers;	
Establishment of Physical Connections by Carriers with Non-Carrier Communications Facilities;	
Planning among Carriers for Provision of Interconnected Services, and in Connection with National Defense and Emergency Communications Services; and	
Regulations for and in Connection with the Foregoing	

REPORT AND ORDER

Adopted: March 1, 1985; Released: March 19, 1985

BY THE COMMISSION:

I. Introduction

1. In this Order, we address the issues raised in our notice of proposed rulemaking in this phase of this docket.[1] In that *Notice*, we observed that our *Access Charge Order* in Phase I of this docket,[2] and the *Modification of Final Judgment* (MFJ), entered on August 24, 1982, by the United States District Court for the District of Columbia,[3] did not address several issues that emanate, in part, from these actions or are otherwise related to the optimal provision of interstate communications services in a competitive environment.

2. These issues are (a) whether the independent telephone companies (ITCs) should be required to implement equal access for interexchange carriers (IXCs) according to a phased approach analogous to that specified for the Bell Operating Companies (BOCs) in the MFJ; (b) what institutional arrangements should replace the role formerly held by the American Telephone and Telegraph Company (AT&T) in the centralized technical and construction planning for (i) interexchange and local distribution networks, and (ii) national security and emergency communications facilities; and (c) whether exchange carriers (BOCs and ITCs) should be required to incorporate into their tariffs the physical, technical, and operational details of interconnection with the facilities of both carriers and non-carriers.

3. With regard to the equal access implementation issues, we find in this Order that the ITCs should be required to implement equal access under certain circumstances and under certain schedules that differ from those set forth in the MFJ. We have defined these in recognition of the differences between the BOC and ITC sectors with respect to (a) the types of markets served; (b) end office switching technologies employed; and (c) the financial resources available to undertake equal access conversions.

4. With regard to the planning issues, we find that (a) general peacetime interconnection planning functions should be implemented through participation of interested parties in the activities of the T-1 Committee, which is sponsored by the Exchange Carriers Standards Association (ECSA) and accredited by the American National Standards Institute (ANSI); and (b) national defense network planning functions

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[1] CC Docket No. 78-72, Phase III, Notice of Proposed Rulemaking, 94 FCC 2d 292 (1983) (*Notice*).

[2] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983) (*Access Charge Order*), *modified on reconsideration*, 97 FCC 2d 682 (1983) *further modified on reconsideration*, 97 FCC 2d 834 (1984) *aff'd in part, remanded in part, Nat'l Assn. of Regulatory Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *petition for cert. denied* 53 U.S.L.W. 3583,3595 (U.S. February 19, 1985) (No. 84-95) (*Naruc v. FCC*).

[3] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).

should be implemented through the mechanism of the plan proposed by the National Security Telecommunications Advisory Committee.

5. With regard to the tariff issues, we note that, since the release of our *Notice*, the exchange carriers (ECs) have voluntarily implemented the proposals we had set forth concerning the inclusion of interconnection information in their access tariffs, and we adopt those proposals for future tariff filings.

II. Background

A. Implementation of Equal Access by Independents

1. The Commission Proposal and the MFJ

6. In the *Notice*, we proposed "to extend, pursuant to our regulatory authority under the Act, to non-Bell (Independent) telephone carriers interconnection obligations patterned after those which will govern the BOCs under the MFJ...."[4] The MFJ establishes the following equal access implementation schedule:

> *1⅔ years (9/1/85)*: "equal access shall be offered through end offices of each BOC serving at least one-third of that BOC's exchange access lines."[5]
>
> *2⅔ years (9/1/86)*: "upon bona fide request, *every* end office shall offer such [equal] access by Sept. 1, 1986."[6]

7. The MFJ also incorporates a waiver mechanism that allows the BOCs to refuse equal access in cases where such construction may be economically infeasible:

> With respect to access provided through an end office employing switches technologically antecedent to electronic, stored program control switches [*i.e.*, electromechanical switches] or those offices served by switches that characteristically serve fewer than 10,000 access lines, a BOC may not be required to provide equal access through a switch if, upon complaint being made to the Court, the BOC carries the burden of showing that ... such access is not physically feasible except at costs that clearly outweigh benefits to users of telecommunications services.[7]

This waiver is, apparently, not intended to be permanent. The decree continues: "Any such denial of access under the preceding sentence shall be for the minimum divergence in access necessary, and for the minimum time necessary, to achieve feasibility."[8]

8. In our *Notice*, we recognized that equal access obligations similar to those in the MFJ may not be workable when applied to the ITCs,

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[4] *Notice*, 94 FCC 2d at 304. We further stated that "we believe it most appropriate, in view of our statutory mandate to promote the development of efficient and broadly available service on a nationwide basis, to ensure the establishment of a 'blueprint' [similar to that of the MFJ] for interconnection to the Independents' facilities."

[5] MFJ, App. B, at para. A.1.

[6] *Id.* (emphasis supplied).

[7] *Id.* at para. A.3.

[8] *Id.*

because of the preponderance of less sophisticated equipment in the ITC sector. We noted, however, that "access to interstate services is required to be offered [by the ITCs] pursuant to access tariffs which are subject to our regulatory review and jurisdiction" and proposed to "utilize such tariffs as an appropriate administrative mechanism for addressing unequal interconnection offerings by Independents. . . ."[9] We proposed the following timetable:

> *2-years*: For central offices to be equipped with new stored program-controlled (SPC) equipment, access will be provided with capabilities identical to those described below for existing stored-program-controlled central offices.
>
> *3-years*: For central offices already equipped with SPC, access will be provided "which is equal in all respects, except that the minimum number of digits necessary to reach other than a carrier pre-selected by the subscriber may be utilized until such time as the nationwide numbering plan is changed."[10]
>
> *No timetable*: For electromechanical central offices: (a) capabilities pertaining to features such as the number of dialing digits must be offered to the extent feasible; (b) where features such as automatic numbering identification (ANI) can be made available to more than one carrier, they should be provided at the same level of capability as specified in the MFJ; and (c) transmission channel quality should be no worse than that provided to the traditional interexchange carrier. Although we did not state that electromechanical exchanges need to be replaced, we did require that "[t]o the extent feasible, such offices shall be modified to offer the capabilities [associated with electronic exchanges]."[11]

2. GTE Consent Decree

9. On May 4, 1983, the GTE Corporation and the Department of Justice (DOJ) filed a Proposed Final Judgment (PFJ), with the United States District Court for the District of Columbia, to resolve an antitrust action brought by DOJ challenging the acquisition by GTE of the IXC, Sprint, which was a subsidiary of the Southern Pacific Corporation. A major feature of the PFJ was a plan for the provision of non-discriminatory equal access to interstate communications facilities by the subscribers of the GTE Operating Companies (GTOCs). In an Opinion issued on December 13, 1984,[12] the Court found the PFJ to be in the public interest and stated that the PFJ would be approved provided that the parties agreed to certain modifications relating to the specific criteria that would be observed if enforcement of the decree were being sought by the Department of Justice. The parties concurred, and a Consent Decree (CD) was entered on December 21, 1984. The CD sets forth the following phased-in equal access implementation timetable, which is closely modeled after the approach of the MFJ, but is adjusted for the specific characteris-

[9] *Notice*, 94 FCC 2d at 306.

[10] *Id.* at 307.

[11] *Id.*

[12] *United States v. GTE Corp.*, Civ. Action No. 83-1298 (D.D.C., December 13, 1984) (*GTE Opinion*).

tics of the GTOC end offices and exchange areas.[13]

> *1½ years (1/1/85)*: End offices containing 1-ESS and stored program controlled switches other than those specified below (*i.e.*, GTD-5, 1-EAX, and 2-EAX).
>
> *3½ years (1/1/87)*: End offices equipped with GTD-5 switches.
>
> *4 years (9/1/87)*: End offices equipped with 1-EAX and 2-EAX. In addition, two-thirds of all GTOC subscriber lines must be provided with equal access. (This proportion may be decreased to the extent that unforeseen circumstances, including the performance failure of non-affiliated providers of hardware and software, prevent this conversion from taking place.)
>
> *7½ years (12/31/90)*: all offices with greater than 10,000 access lines (except where changing circumstances make implementation economically infeasible).

10. In addition to the waivers cited in the timetable, the CD addresses the unique problems of electromechanical switches, which comprise a considerably larger percentage of end office switching equipment of the GTOC system than in the BOC end offices. No step-by-step offices need provide equal access, provided that a trunk-side connection for IXCs is offered at *all* GTOC offices, including those equipped with step-by-step equipment, "unless such access is not physically possible except at costs that clearly outweigh potential benefits to users of telecommunications services. . . ."[14]

B. Joint Planning

1. The Commission Proposal

11. We tentatively concluded in the *Notice* that the scope of any joint planning should be limited to the specification of technical parameters and compatibility criteria at the point of interconnection between an exchange carrier and IXCs, customer premises equipment, or private communications facilities. We proposed that such planning be carried out by the Exchange Carriers Association (ECA) and that the membership criteria be those set forth in our *Access Charge Order* for the ECA. IXCs as well as this Commission would, therefore, be excluded. We noted that:

> it is our tentative belief that this Commission should be assigned responsibilities and functions regarding the joint planning activities of the association (ECA) which are designed to ensure that the association does not operate in a manner which frustrates the goals and policies which we are establishing. This result can be achieved without requiring that this Commission be given membership on the

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[13] CD, App. B at para. A.(1). A starting date of May 4, 1983 (the proposed date of entry) was used in calculating the elapsed time to the specific completion dates (in parentheses) set forth in the CD. The results, are rounded to the nearest half-year. At the time the PFJ was filed, GTE committed itself to following the schedule set forth therein even though approval of the Court had not yet been issued. If a bona fide request for equal access interconnection is received from an IXC, the GTOC must implement interconnection within no more than 12 months. Otherwise the time limits in the schedule must be observed.

[14] CD, *Id.*, App. B at para. A.4.

association.[15]

We then asked for comments on our proposals as well as upon alternative suggestions regarding scope of planning, institutional arrangements, and the composition of the membership of any joint planning body.

2. Formation of Exchange Carriers Standards Association

12. On May 24, 1983, a pre-oganizational meeting of exchange carriers (ECs) was held in Atlanta, Georgia, under the auspices of the Washington Legislative Council of Telecommunications (an *ad hoc* group formed by the carriers to deal with post-divestiture problems). At this meeting, a substantial portion of the spectrum of exchange carriers was represented by attendees from the United States Independent Telephone Association (now the United States Telephone Association or "USTA", the seven Bell regional holding companies, GTE, United Telecom, and various independent telephone holding companies and operating companies. As a result of this and subsequent meetings, the Exhange Carriers Standards Association (ECSA) was created, and incorporated in September 1983, in the State of New York, as a not-for-profit corporation. ECSA then became a party in this proceeding and filed, in its comments, an alternative to our proposal for the implementation of the joint planning function.

C. Tariff Issues

13. We proposed that the interstate access tariffs of the ECs formally reflect the responsibilities of these carriers to provide equal access and interconnect their facilities with IXCs and other access customers. We specifically proposed that tariffs filed by ECA and the individual ECs should include language providing for (a) interconnection with non-carriers (private networks and CPE); (b) interconnection with resellers; (c) the incorporation of the provisions of Part 68 of the Commission's Rules (CPE interconnection standards); and (d) certain technical and operational details of the ECs' offerings.

III. Implementation of EQUAL Access by Independents

A. Positions of Parties

14. Twenty-four parties filed comments or reply comments (or both) on the various issues associated with equal access implementation requirements for the ITC sector. Pleadings were filed on behalf of IXCs (nine parties);[16] ITCs (seven parties);[17] equipment manufacturers (two

[15] *Notice*, 94 FCC 2d at 317-18.

[16] AT&T, GTE-Sprint, ITT-COINS, MCI, SBS, Western Union, Allnet, General Communications Inc., and U.S. Telephone. IXCs other than AT&T are referred to in this Order as "other common carriers" (OCCs).

[17] Centel, GTE Service Co., Rochester Telephone Co., Rural Telephone Coalition, Southern New England Telephone Co., USTA, and United Telephone System.

parties);[18] user groups (two parties);[19] and state and federal government agencies (four parties).[20]

15. In general, the OCCs argue for an implementation of equal access that is as immediate and as comprehensive as possible in order that they may compete more effectively with AT&T. Business user groups and equipment manufacturers also seek expeditious implementation of equal access. The former, as large consumers of interexchange telecommunication services, seek to minimize their communications costs. The latter seek to compete more effectively in markets for customer premises equipment and equipment related to switching and transmission applications.

16. The ITCs generally support the proposal that they be required to implement equal access. They tend, however, to support temporizing measures such as (a) the imposition of such a requirement only if there has been a demand for equal access services from an IXC; and (b) the opportunity to deviate, when indicated, from the timetable proposed in our *Notice*. Some ITCs propose that exchanges serving less than 10,000 access lines should be granted a waiver of equal access conversion requirements as outlined in the GTE CD. *See* para. 9, *supra*.

1. Proposed Timetable

17. Eighteen parties have commented upon the proposed timetable. Three parties find that the timetable is reasonable[21] and four argue that the timetable is too long.[22] The latter take the position that existing technology will permit acceleration of our proposed schedule. Two, Public Service Commission of Wisconsin (Wisconsin) and Kentucky Public Service Commission (Kentucky), essentially argue that there should be no timetable at all. AT&T and Centel claim that the timetable is too short and propose a five-year implementation deadline. AT&T further proposes (a) that the Commission take steps to facilitate the processing of waiver requests; and (b) that there be an exemption for end offices serving less than 10,000 lines. Centel states that there may be central office conversion problems due to the diversity of suppliers, some of whom may be no longer in business. Similar arguments are extended to the case of end offices using electromechanical equipment.

18. Six parties from the ITC sector,[23] and the Rural Electrification Administration (REA), suggest that timetables should be flexible, stating,

[18] CCIA and ITEC Inc.

[19] ICA and American Petroleum Institute.

[20] DOJ, Kentucky Public Service Commission, Public Service Commission of Wisconsin, and the Rural Electrification Administration.

[21] General Communications Inc., MCI, and International Communications Association.

[22] SBS, Western Union, U.S. Telephone Inc., and ITEC Inc.

[23] Rochester Telephone Co., GTE Service Co., Rural Telephone Coalition, Southern New England Telephone Co., United Telephone System, Inc., and USTA.

generally, that since there is a considerable variability among existing SPC exchanges, the three-year implementation schedule might not be universally appropriate and implementation might be better scheduled on a less formal basis. REA claims that the equipment necessary to accomplish equal interconnection at end offices of small rural companies (which typically contain electromechanical switches) is not readily available and urges that this Commission postpone the requirement that local carriers prepare for equal interconnection at such offices until the necessary technology becomes available or, alternatively, consider requiring equal access interconnection at an access tandem only.

19. With regard to the conversion of existing SPC offices, USTA states that ITCs are unable to obtain definitive information from their equipment manufacturers regarding their ability to upgrade a given piece of SPC equipment. USTA claims that this inability stems, in part, from a lack of defined technical specifications regarding the exact nature of equal access. Further, USTA states, not all SPC switches are convertible to equal access because of their design. Under these circumstances, it might be necessary to retire such switches prematurely, which, from USTA's viewpoint, would be an unreasonable disturbance of an orderly and economically efficient process for deriving maximum benefit from existing equipment. USTA also recommends that the Commission modify its proposal that all new SPC switches ordered after the effective date of any Commission order in this proceeding have the capability of offering equal access to one requiring that actual conversion need not occur unless and until an IXC requests equal access and agrees to the resulting tariff changes. Rochester Telephone Company (Rochester) concurs with USTA and other parties in claiming that not all SPC switches may be convertible.

20. Six parties cite potential problems with the conversion of electromechanical offices.[24] The Rural Telephone Coalition (RTC) urges that ITCs be given the option of refusing to implement equal access at such offices, and in any event, that such equipment not be prematurely retired absent a demand for equal access interconnection.

21. GTE Service Corp. compares our implementation proposals to those of the CD in which it had participated, stating that the equal access upgrading requirements of our *Notice* are more burdensome than those set forth in the CD.[25] GTE Service Corp. urges that the principles of the CD be adopted by the Commission and notes that together the MFJ and

[24] AT&T, Centel, United Telephone System, Rural Telephone Coalition, DOJ, and REA.

[25] At the time that the GTE comments were filed, the PFJ had not been approved by the Court. Subsequent to that filing, the Court approved the PFJ (subject to some suggested additions), which contained those requirements to which GTE has referred. *See* para. 9, *supra*.

CD apply to the provision of equal access to 90 percent of the total, nationwide access lines.

2. Implementation on Demand Only

22. The *Notice* did not condition an ITC's obligation to convert to equal access in accordance with our timetables on there being a demand for such interconnection from an IXC. Ten parties have suggested that equal access conversions not be required until a demand from an IXC has been received. The sectors represented are ITCs (six parties);[26] IXC (one party);[27] equipment manufacturing (one party);[28] and state and federal agencies (two parties).[29]

23. The ITCs cite the possibility that if they are required to implement equal access, even in the absence of an IXC demand for such services, they may be required to carry a large cost burden without a sufficient offset in additional revenues from toll service. REA claims that most REA-financed systems will never receive an interconnection request, but these systems could, nevertheless, incur a conservatively estimated total of $367 million in equal access implementation costs if the conversion of all Class 5 offices were required. As an alternative, REA suggests equal access interconnection only be required at higher level offices until Class 5 implementation becomes more feasible.[30]

3. Exemptions for End Offices Serving Less than 10,000 Lines

24. Establishing exemptions for end offices serving less than 10,000 access lines, although not proposed in the *Notice*, is embodied, with variations, in both the MFJ and CD.[31] Five parties support the concept,[32] arguing generally that (a) central office equipment in such exchanges is likely to be electromechanical; (b) demand for equal access interconnection to exchange facilities from OCCs is likely to be low; and (c) therefore, the costs of conversion would likely exceed any benefits derived from increased revenues. RTC proposes that rural exchange carriers be subjected to no greater obligations than those imposed upon GTE by the CD. It accordingly suggests a blanket exemption for end offices serving fewer than 10,000 lines. GTE implicitly supports a 10,000 line exemption in proposing that the terms of its CD be extended to other carriers. USTA,

[26] USTA, Rural Telephone Coalition, GTE Service Co., SNETCO, United Telephone System, and Centel.

[27] MCI.

[28] U.S. Telephone Inc.

[29] Kentucky PSC and REA.

[30] *See* also para. 42, *infra*.

[31] *See* paras. 7 and 10, *supra*.

[32] AT&T, USTA, GTE-Service Co., RTCs, Western Union.

on the other hand, claims that the 10,000 lines threshold should be higher, but does not propose a specific level.

25. A blanket 10,000 lines exemption is opposed by some parties. The International Communications Association (ICA), a user group, prefers that individual justifications for an exemption be proposed by ITCs wishing an exemption. DOJ opposes a blanket exemption, preferring an implementation schedule that takes all factors into account, such as new techniques for remote digital switching.

B. Discussion

1. Summary of the Record

26. There is general agreement among all sectors that the implementation of equal access by the ITCs is desirable. With respect to the manner in which such access is to be achieved, however, there is a well delineated schism between two groups. The first group (ITCs, AT&T, state regulatory commissions, and REA) generally argues that our proposed timetables would be too stringent in many cases if they were applied uniformly to the entire ITC sector. A more liberal compliance policy, embodying certain deviations on a case-by-case basis, is suggested. Members of the second group (OCCs, user organizations, and equipment manufacturers) either agree with our timetable concept or think that it should be accelerated.

27. Those who find our proposals for ITCs too rigorous argue that we should relax those requirements by (a) adopting a liberal policy for waivers of the implementation timetable; (b) requiring the implementation of equal access only upon a bona fide demand by an IXC; (c) exempting end offices serving less than 10,000 lines; and (d) exempting end offices using electromechanical equipment.[33]

28. Those who approve our proposed schedule, or seek to accelerate it, and those who would discourage various waivers and exemptions, make the following claims: (a) technology is available that would allow reconfigurations of non-conforming offices to be implemented in accordance with our proposed timetable; (b) the implementation of equal access at BOC tandems or at those of the larger ITCs will permit our schedule to be met or accelerated; and (c) extensive deviations from our proposed schedule (including those resulting from the adoption of an implementa-

[33] Rochester has suggested that the forced conversion of such offices would lead, in many cases, to premature equipment retirements and argues that this Commission should preempt state regulation over the depreciation practices of connecting carriers to ensure that investment in existing equipment is fully depreciated upon its replacement. This issue is not properly before us in this proceeding; consequently, we will not address it further in this Order.

tion-on-demand policy) will constrain the economic activities of the IXCs,[34] equipment manufacturers, and users.

2. Differences between BOCs and ITCs

29. The parties seeking flexibility in our approach to implementing equal access by the ITC sector have argued that it is not as feasible to apply a uniform implementation timetable to the ITCs as it is to the BOCs. RTC points to a number of fundamental differences between the BOCs and ITCs. Prior to the AT&T reorganization, the implementation of exchange area communications, including the design of end offices, was performed on behalf of the BOCs by the AT&T General Departments, the Bell Laboratories, and Western Electric. Under this system, many important functions were performed on a centralized basis such as: system engineering, equipment design, equipment manufacturing, equipment procurement, acceptance testing, and installation planning.

30. As a consequence, the predominant proportion of BOC central office equipment is of Western Electric design, and its characteristics are well documented. Further, although there is a considerable range in the type of switching equipment in the various BOC end offices, from step-by-step electromechanical equipment to advanced SPC equipment, the preponderance of BOC service is offered in high or moderate population density areas, and the majority of its access lines are served by a relatively small number of SPC designs. Such uniformity, as characterized by markets served and equipment employed, is clearly not the case among the ITCs.

(a) Markets Served by ITCs

31. With regard to markets served, the ITC sector is characterized by an industry structure in which the operating companies of a few holding companies provide the vast preponderance of service. In seeking the appropriate policy for equal access implementation in this sector, it is useful to undertake a quantitative assessment of the ITC industry in order to evaluate its place in the overall telecommunications environment in the United States. Figure 1 provides a comparison of the BOCs and the ITCs in terms of the number of access lines served.

32. As of December 31, 1983, there were 111.3 million access lines in the United States. Of these, 89 million (80 percent) were served by the 22 BOCs. The ITC sector, consisting of 1431 operating companies, served the remaining 22.3 million lines (or 20 percent). Of these independent lines,

[34] Some IXCs have claimed that if equal access were implemented in a given area absent a demand for such service, an IXC might be more likely to seek to provide service there than if it were required to go through a formal procedure of filing requests for equal access conversion with the EC.

however, the vast majority are served by but a small proportion of these 1431 operating companies.

33. As shown in Fig. 1, the 18 GTOCs serve 44 percent of the ITC access lines, and that these companies, in combination with the 22 BOCs, serve 89 percent of the total U.S. access lines. Furthermore, the largest eleven ITCs (including GTE) serve, in combination with the BOCs, approximately 99 percent of the U.S. telephone access lines.[35]

FIGURE 1

*Access Lines Served by BOCs and Larger Independents**

	# OCs	# Lines (millions)	% U.S. Lines (cum.)	% Independent Lines (cum.)
BOCs	22	89	80.0	———
(INDEPENDENTS)				
GTE	18	9.9	88.8	44
United Tel.	20	3.0	91.5	58
Continentel Tel.	39	2.1	93.4	67
SNETCO	1	1.6	94.9	74
CENTEL	14	1.2	96.0	80
AllTel	1	.85	96.7	84
Cincinnati Bell	1	.69	97.3	87
PRTC	1	.50	97.8	89
Rochester Tel.	1	.44	98.2	91
Lincoln Tel.	1	.20	98.4	92
Century Tel.	35	.20	98.6	93
TOTAL (BOCs)	22	89.0	———	———
TOTAL (ITCs)	132	20.7**	———	———
TOTAL (BOC + ITC)	154	109.7		

* Sources: USTA, *PhoneFacts '84*.
USITA, *Holding Company Report*, May 1983.

** Includes only the access lines of the 132 operating companies of the first 11 ITCs (ranked by annual revenues) listed in *PhoneFacts '84*. The remaining approximately 1300 ITCs service approximately 1.6 million lines or approximately 1% of the nationwide total.

34. The remaining ITCs, 1309 operating companies, serve only one percent of the total access lines in the U.S., although they comprise 91 percent of the ITCs. Thus, the average number of lines served by each of these 1309 companies is approximately 1,300. Approximately 1,200 of these companies serve less than 10,000 lines.[36]

[35] As shown in Fig. 1, these eleven entities comprise five holding companies, which control 126 operating companies, and six individually owned companies. Thus, a total of 148 operating companies (22 BOCs and 126 ITC operating companies) serve 99 percent of the U.S. access lines.

[36] *See PhoneFacts' 84*.

35. It thus becomes apparent that it may be feasible to adopt a policy of prescribing a set of relatively uniform equal access implementation procedures, applicable to only a small segment of the ITC industry, that would result in the provision of equal access to the overwhelming majority of the ITC subscribers.

(b) Switching Equipment of the ITCs

36. Several parties associated with the ITC sector have argued that our proposed implementation plan, insofar as it applies to SPC switches, should not be uniformly applied because of the wide variety of SPC equipment that is now in place and that is available for future installation by the ITCs. They have also argued that it would be inappropriate to prescribe either the conversion of existing electromechanical equipment or its retirement.

37. USTA claims that the following problems arise from the diversity of SPC equipment: (a) not all manufacturers may be willing to upgrade their equipment even if it is upgradeable; (b) not all switches are equally upgradeable; and (c) some switches may not be upgradeable at all. With regard to electromechanical switches, and SPC switches that are not feasibly convertible, USTA proposes that we consider equal terminating access as a less costly alternative.

38. Rochester suggests that not all existing SPC installations may be convertible within the 3-year period proposed in the *Notice*. Rochester points out that it has SPC equipment manufactured by Northern Telecom, Automatic Electric, Nippon Electric, and Western Electric. It claims that it does not know whether any of the manufacturers "would supply necessary software modifications within three years, or whether they intend to offer these modifications at all."[37]

39. RTC claims that it cannot comment exhaustively upon our proposal because no comprehensive tabulation of the central office equipment of rural telephone companies has been made. RTC points out that existing analog SPC equipment is memory-limited and is no longer being manufactured.[38]

40. With regard to digital SPC equipment, RTC states that 10 to 15 percent of REA central offices are so equipped, but that some of the manufacturers are no longer in business. RTC claims that in any event *generic* specifications for the conversion of digital equipment can be completed in three years, but that specific conversion may take longer. RTC therefore proposes that manufacturers be given three years in which

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[37] Rochester Comments at 5.

[38] Analog SPC as discussed by RTC apparently consists of SPC common control equipment coupled with an analog switching matrix. A digital SPC switch would use time division multiplex techniques to perform the switching function.

to develop generic specifications and that actual implementation times be negotiated on a case-by-case basis.

41. RTC notes that the conversion of electromechanical equipment can present considerable problems to the REA companies. RTC states that approximately 80 to 85 percent of REA equipment is step-by-step and that another 5 percent is crossbar. Further, RTC states that 90 to 95 percent of the step-by-step equipment, which was manufactured by Stromberg, is no longer being produced by that company.

42. REA also addresses the problem of the conversion of its predominantly electromechanical offices. It states that no manufacturer has produced equipment that could effect such a conversion, but acknowledges that "[o]ne manufacturer, ITEC, has equipment on the drawing boards which could accomplish equal interconnection at the Class 5 step office."[39] REA cautions, however, that conversion estimates would be in the $60,000 to $75,000 range per end office. Finally, REA provides an estimate of $367.5 million as the cost of equal access implementation for all REA-financed systems. This estimate is based on the assumption that 5,000 step end offices would be converted, at $70,000 per office, and that 700 digital offices would be converted at $25,000 per office.

3. Equal Access Implementation Plan[40]

(a) General Considerations

43. It is evident from the record that the ITC sector evidences a degree of diversity that we do not observe among the BOCs. The BOCs comprise 22 operating companies, which, because of their common ownership and management for many years, have virtually identical categories of end office switching technology. Further, the BOCs serve 80 percent of the total access lines in the United States from this relatively homogeneous configuration. The ITC sector is clearly different. Some 1431 operating companies serve 20 percent of the nation's access lines. Among these companies, the GTE system of 18 operating companies accounts for 44 percent of the ITC access lines—or 9 percent of the nation's access lines. A mere 132 of the 1431 ITCs serve over 90 percent of the ITC access lines.

44. With regard to switching equipment, the relatively small proportion of SPC equipment in ITC end offices is provided by a multiplicity of manufacturers, not all of whom have continued to manufacture or service the products they have sold. The preponderance of ITC switching equipment is of the electromechanical type, and apparently, the successful

[39] REA Comments at 5.

[40] We set out in the *Notice* the basis of our jurisdiction to establish an equal access implementation plan for ITCs. *See*, *Notice* 94 FCC 2d at 300-304. No party has challenged our authority in this regard.

conversion of such switches by off-the-shelf equipment has not yet been demonstrated. Given these factors, it is likely that an implementation timetable similar to that of the MFJ would be inappropriate if imposed on the ITCs.

45. We must also take into account that GTE has committed itself to following the schedule set forth in the CD and that, consequently, the commitments already undertaken by the BOCs and the GTOCs will pace the implementation of equal access for approximately 89 percent of the nation's access lines. We need, therefore, only adopt a policy applicable to, and appropriate for, the remaining 1413 ITCs, which serve the remaining 11 percent of access lines.

46. We could consider the CD as a paradigm for application to the non-GTE ITCs. The timetable in the CD for the conversion of existing SPC end offices embodies, however, references to the specific types of equipment of specific manufacturers that are known to be installed in GTE end offices. But based on the record in this proceeding, it appears that many different types of equipment (in addition to those specified in the CD) are deployed in the non-GTE ITC end offices. Furthermore, GTE is a substantially larger company than most other ITCs with greater access to the necessary capital to implement an equal access conversion schedule. Finally, there is no reason to assume that the timetable GTE agreed to in the CD to settle an antitrust challenge to its acquisition of Sprint is necessarily appropriate for other ITCs.

47. We shall, therefore, establish an implementation schedule that recognizes the following characteristics of the non-GTE sector, which distinguish it from both GTE and the BOCs: (a) the variability in installed SPC equipment types; (b) the predominance of electromechanical equipment; (c) the existence of more severe constraints on capital spending; and (d) the likelihood that demand for equal access service, by customers and OCCs alike, will be less.[41] In so doing, we shall impose time limits in those cases where the end office is equipped with SPC switching and a reasonable request for equal access services exists. Finally, we shall recognize the existence of problems that may be imposed by capital constraints, and the non-standardization of installed SPC equipment, by adopting an exception mechanism.

[41] We have noted in paras. 33-34, *supra*, that 1309 (or 91 percent) of the ITCs serve less than one percent of nationwide access lines and that the average number of lines served by these ITCs is approximately 1,300. The typical non-GTE ITC is, therefore, a relatively small company serving a rather small market, usually in a rural area. As a consequence, the factors (c) and (d) cited in this paragraph are likely to obtain for the majority of non-GTE ITCs.

(b) Specific Requirements

48. *End Offices Equipped with SPC Switches:* End offices equipped with SPC switches must be converted to offer exchange access services that are equal in type and quality to that offered to AT&T, within three years of the receipt of a reasonable request[42] for equal access services from any OCC. Absent such a request, end offices should be converted as soon as practicable, according to a schedule and a degree of implementation that reflect the capital constraints of the operating company and the market and other business conditions in the area served by the end office. Furthermore, prior to full conversion, the features set forth in para. 60, *infra,* should be offered to the extent feasible.

49. *End Offices Equipped with Electromechanical Switches:* Whether or not a reasonable request for equal access is presented, end offices equipped with electromechanical switches will not be required to be converted to equal access according to a specified timetable. Rather, these end offices should be converted as soon as practicable according to the guidelines we have set forth in para. 60, *infra.*

50. *Exception Mechanisms:* An ITC receiving a reasonable request for equal access interconnection at an SPC-equipped end office may apply to this Commission for a waiver of the three-year timetable, or of the requirement for the provision of certain specific equal access features, if it can demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services.

(c) Equal Access Features

51. In para. 48, *supra,* we require that SPC-equipped end offices, upon receiving a reasonable request from an OCC, "be converted to offer access service that is equal in type and quality to that offered to AT&T. . . . " In order to give more explicit guidance to those ITCs affected

[42] Sec. 201 (a) of the Communications Act of 1934, as amended, states, "it shall be the duty of every common carrier engaged in interstate or foreign communications . . . to furnish such communications service upon reasonable request therefor . . . ," but does not attempt to further define "reasonable." Neither shall we, in this Order, prescribe the elements of a "reasonable request" for equal access services from unconverted ITC end offices, but shall leave these arrangements to be developed in the tariff process. Tariff provisions the ITCs already have on file concerning ordering of access services and facilities may prove adequate for establishing the elements of such a request. To the extent that ITCs do not view these provisions as adequate for this purpose, they are free to make tariff filings setting our particular terms and conditions that will apply to such requests. We note that both the MFJ and the CD condition the obligation of an EC to convert certain end offices to equal access on there being a "bona fide request" to do so, but neither decree attempts to define such a request.

by this requirement, we shall attempt to describe further the concepts "exchange access services" and "equal in type and quality."

52. The MFJ defines "exchange access" as "the provision of exchange services for the purpose of originating or terminating interexchange telecommunications."[43] It then defines "exchange access services" to include, but not be limited to, the following activities or functions of an EC in the provision of exchange access: "the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, directory services, testing and maintenance of facilities and the provision of information necessary to bill customers."[44]

53. Potential operational inequalities in subscriber signalling (due to technological limitations, and to constraints imposed by the existing interstate numbering plan) are also addressed. The following requirements are imposed: (a) the option of preselecting an IXC, through which originating traffic may be routed without the use of an access code, shall be offered[45]; (b) access signalling to reach carriers that are not so preselected must be provided with the minimum number of digits; and (c) upon revision of the nationwide numbering plan to require additional signalling digits, all IXCs shall be accessed with the same number of digits.[46]

54. The MFJ also sets forth a non-quantitative definition of equality as it pertains to certain technical parameters of the EC network. "Such [equal access] connections, at the option of the interexchange carrier, shall deliver traffic with signal quality and characteristics equal to that provided similar traffic of AT&T, including equal probability of blocking, based on reasonable traffic estimates supplied by each interexchange carrier."[47]

55. In subsequent Motions for Partial Reconsideration, and Reconsideration and Clarification (of the MFJ), the BOCs indicated their concern with an appropriate definition of "equality." In addressing this issue, the Court summarized the BOCs claims that exact duplication is infeasible:

> The [BOCs] assert that technical deviations will be so slight as to be imperceptible to all customers, whether of voice or data [and that they] had urged the Court to accept a definition of 'equal access' as access whose 'overall quality in a particular area is equal within a reasonable range which is applicable to all carriers' and to reject a more stringent definition which would demand access that yields identical technical quality (*i.e.* identical values for loss, noise, and echo, and identical possibilty of

[43] MFJ at Sec. IV, F.

[44] *Id.*

[45] ITCs who will offer equal access should be aware that the FCC is examining the reasonableness of the routing (by some local exchange carriers) of the default interLATA traffic of non-preselecting subscribers to AT&T. *See*, Memorandum Opinion and Order on Reconsideration, CC Docket No. 85-89, paras. 17-23 (February 25, 1985).

[46] *Id.* at Appendix B,2.

[47] *Id.*

> blocking) . . . *The Court accepts the Operating Companies' definition and will not insist on absolute technical equality.*[48]

56. The GTE CD also uses "equal in type and quality" as the criterion for measuring the efficacy of equal access implementation. As in the MFJ, the CD sets forth a partial list of features to those in the MFJ, and avoids a quantitative definition of "equal in type and quality."[49] Further, in the *GTE Opinion*, the Court lists the features of equal access that, GTE had stated, would be applicable to the GTOCs:

> The features of full equal access are: (1) dialing parity; (2) rotary dial access; (3) network control signalling; (4) answer supervision; (5) automatic calling number identification; (6) carrier access code; (7) directory services; (8) testing and maintenance of facilities; (9) provision of information necessary to bill customers; and (10) presubscription. . . .[50]

57. We see no reason to attempt to refine the concepts "exchange access services" and "equal in type and quality" to an extent exceeding that delineated in the MFJ and CD. With regard to the features of equal access service described in those decrees, we recognize that there will be considerable variation from end office to end office in the ITC sector in the types of exchange access services that are currently being offered to AT&T. We only require that such services be offered to OCCs to the extent that they are made available to AT&T, and consider the lists of features quoted above to be illustrative of the types of services that will generally have to be provided on an equal access basis once an end office is converted. By so doing, we anticipate that any new construction requirements will be in the realm of technological feasibility for any given ITC, since the required features are already being provided AT&T.

58. With regard to the definition of "equal in type and quality," we recognize that a definition of equality that is overly quantitative and microscopic in detail is impractical. Even AT&T's connections to ITC facilities vary in technical quality (with regard to impulse noise, error rates, distortions, and blocking probabilities) from end office to end office, and even within an end office. We concur with the District Court in its *MFJ Reconsideration* opinion that technical standards based upon the perceptions of customers are appropriate and that "absolute technical equality" need not be achieved.[51]

59. Therefore, subject to the caveats just discussed, we endorse the features of equal access services that have been set forth in the MFJ and CD as being equally valid in their application to the services we are

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[48] *U.S. v. Western Electric Co.*, 569 F. Supp. at 1062, 1063 (1983) (*MFJ Reconsideration*) (emphasis added).

[49] *See* MFJ, Appendix B, and CD, Appendix B.

[50] *GTE Opinion*, *supra* note 12, at 30 n.55.

[51] *See* para. 55, *supra*.

requiring the ITCs to implement in this Order.[52] For further clarification, we reiterate the following requirements set out in the *Notice* for the conversion of existing SPC-controlled end offices, which were generally patterned after the MFJ:

> Programming of existing stored program controlled central offices shall be modified, during a three-year period . . . , to support access to the services of all interexchange carriers which is equal in all respects, except that the minimum number of digits necessary to reach other than a carrier pre-selected by the subscriber may be utilized until such time as the nationwide numbering plan is changed. At such time as the central office modification is completed, existing subscribers shall be given an option to pre-select a specific interexchange carrier which is interconnected with the exchange, and no additional digits shall be required for the subscriber to reach the services of that carrier. Thereafter, new subscribers shall be given this choice at the time when service is initially arranged. In both cases, the selection may subsequently be changed by the subscriber at his or her option.[53]

60. With regard to electromechanically-equipped end offices, we also proposed, and now adopt, the following, less stringent criteria for the provision of access:

> To the extent feasible, such offices shall be modified to offer the capabilities identified . . . [with regard to the conversion of SPC-equipped exchanges] utilizing techniques such as interconnection on a tandem basis where common equipment is capable of supporting such operation. If ANI (automatic number identification) capabilities or subscriber billing capabilities are capable of being made available to more than one interexchange carrier, to the extent the same is requested by such carriers they shall be made available in the same manner as is specified in the MFJ. If preselection of a particular carrier that might be accessed without dialing additional digits is not possible because of inflexibility of the electromechanical switching facilities, at minimum the exchange carrier must make available seven digit local telephone number access, with facilities and capabilities no worse than those provided in connection with PBX trunk service by the carrier. The carrier must make available transmission capabilities . . . which are no worse than those provided the traditional interexchange service provider accessing its office, and it shall provide access, to the extent possible, that uses the minimum number of accessing digits, and that makes possible access from rotary dial equipment to the services of each interexchange carrier.[54]

(d) Rationale for Conclusions

61. We have decided to impose these specific equal access implementation requirements in recognition of the differences between (a) the non-GTE independents and (b) GTE and the BOCs, which we have discussed

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[52] Nothing in this Order prejudges any issue now pending before this Commission arising from the type of equal access provided by the BOCs or GTOCs, or limits the ability of any person to seek relief from the Commission predicated upon an alleged failure of a BOC or GTOC to provide other interexchange carriers with access equal to that provided AT&T.

[53] *Notice*, 94 FCC 2d at 306.

[54] *Id.*

above.[55] These differences reside primarily in the types of switching equipment used, the markets served, and the financial resources available to most non-GTE ITCs.

62. Accordingly, we have retained the recommendation (as set forth in the *Notice*) regarding the exemption of end offices equipped with electromechanical switches. We have not imposed a timetable upon such end offices (whether or not a request for service is presented) in consideration of the financial burdens they would be likely to encounter.[56] Our new requirements differ from those set forth in the *Notice* in two respects: (a) conversion of end offices equipped with SPC switches need not be implemented absent the presentation of a reasonable request (in which case the three-year deadline proposed in the *Notice* will apply); and (b) the two year deadline for the conversion of end offices to be equipped with new SPC, which was proposed in the *Notice*, will no longer be applicable.

63. We have concluded that the unconditional timetables proposed in the *Notice* for SPC end offices would not be in the public interest. Given the heterogeneity of the SPC equipment now installed in ITC end offices, an unconditional requirement for conversion to equal access could prove excessively expensive in those cases where the demand for conversion is nonexistent, or small. And, in light of the types of markets served by most ITCs, it is not necessarily the case that OCCs will be anxious to serve ITC exchange areas with equal access services. Accordingly, we shall require conversion only upon presentation of a reasonable request for service.

64. In retaining a three-year deadline for the conversion of SPC-equipped end offices, we have balanced the claims of those parties who state that three years or more could be required to convert a specific type of equipment or configuration, with the recognition that some of the larger non-GTE ITCs may have relatively sophisticated equipment that can be converted in less than three years. The CD acknowledges that such differences exist within the GTE sector and does, indeed, impose different timetables, which comport with the relative degrees of sophistication of the SPC switches that are known to exist among the GTOCs.[57]

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[55] *See* paras. 29-47, *supra.*

[56] Some of the parties have urged that 10,000 lines per end office be used as a threshold criterion for determining whether an end office should be exempted. Since SPC equipment that is feasibly convertible to equal access applications can be used in end offices serving fewer than 10,000 lines, we find that exemption on the basis of switch technology, rather than the number of lines served, is a more useful criterion. In any event, it is likely that most end offices serving fewer than 10,000 lines use electromechanical, and not SPC, switching equipment, and thus would not be subject to the conversion timetable specified in this Order.

[57] *See* para. 9, *supra.*

65. Since the distribution of specific SPC switch types among the non-GTE ITCs is not known with any degree of precision, we cannot make equipment-based distinctions in an implementation timetable for these companies. In those cases where the three-year timetable would impose a serious hardship upon an ITC, the exception mechanism we have set forth in para. 50, *supra*, will be available. Conversely, there may be instances (such as end offices equipped with switching equipment for which the generic software and other equal access conversion facilities are available off the shelf) where the three-year deadline is unnecessarily long. In particular, the availability of generic software for equal access will be quite likely in those instances where newer SPC equipment is being voluntarily installed as a replacement for electromechanical equipment.[58] In such cases, the ITC should endeavor to make the necessary conversions earlier than three years following a reasonable request.[59]

IV. Carrier Planning for Interconnected Services and NSEP Communications Services

A. Positions of Parties

66. Thirty-six (36) parties have filed comments or reply comments (or both) on the proposed range of questions set out for discussion in the *Notice* on joint planning. Pleadings were filed on behalf of IXCs (eleven parties);[60] ITCs (eight parties);[61] equipment manufacturers (seven parties);[62] user groups (three parties);[63] and state and federal agencies and public associations (eight parties).[64]

67. The general consensus of commenters is to favor an institutional arrangement for technical planning that is based on voluntary participation and a broad membership spectrum, in order to minimize potential antitrust concerns. AT&T argues, for example, that "by not committing to

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[58] Even where no OCC has requested interconnection services, the replacement of electromechanical equipment with an SPC digital switch can be economically advantageous where significant savings in maintenance and other operating expenses are achieved.

[59] For such end offices, we see no reason why the District Court's admonition in the CD should not also govern the actions of ITCs: "Since the decree requires [the GTOCs] to offer equal access 'as promptly as possible' . . . , they are required to advance the implementation of equal access if the necessary software and hardware become available sooner than anticipated." *GTE Opinion*, *supra* note 12, at 34 n. 61.

[60] AT&T; GTE Sprint; ITT-Coins; MCI; SBS; Western Union; Allnet; U.S. Telephone; American Satellite Company; TRT-Telecom; RCA-Americom.

[61] Centel; Rochester; Southern New England (SNETCO); USTA; United Telephone System; Mid-Rivers Telephone Coop and North Pittsburgh Telco; GTE Sprint.

[62] U.S. Telecom Suppliers Association; IDCMA; IBM; Northern Telecom; Telephone and Data System Inc.; Ericsson, Inc.

[63] ICA; American Petroleum Institute; Ad Hoc Telecom Users Committee.

[64] DOJ; PSC of Wisconsin; ANSI; Anchorage Telephone Utility; ECSA; Secretary of Defense; DCA; U.S. Activities Board & Standards; IEEE.

adopt the standards they develop, standards-makers lessen the possibility that they will stumble into a contract or a conspiracy in restraint of trade."[65] MCI, IBM, and Centel support this view. DOJ, while emphasizing that Commission sponsorship of joint planning does not create any antitrust law immunity, states that "properly structured and narrowly focused joint ventures for dealing with matters such as interconnection standards are usually consistent with the antitrust laws."[66]

68. Most parties (including DOJ) take the position that a planning mechanism built around the Exchange Carriers Association (ECA), which was proposed in our *Notice*, is too narrow in its membership responsibilities and focus. Instead, they support the proposal of the Exchange Carrier Standards Association (ECSA) wherein joint planning (limited to the specification of the technical and physical characteristics of the interface between EC and IXC facilities) would be implemented through the voluntary participation of interested parties in the activities of the ECSA-sponsored T-1 Committee, which has been accredited by the American National Standards Institute (ANSI).[67] Most parties also oppose a requirement of Commission membership or oversight with regard to the activities of the T-1 Committee.

69. Those parties responding to the issues of national security and emergency planning (NSEP),[68] favor maximum use of the existing National Coordinating Mechanism (NCM), adopted by the industry under the authority of the President and the Secretary of Defense in response to Executive Order No. 12382 (dated Sept. 13, 1982).

B. Discussion

1. Authority of Commission to Require Limited Joint Planning

70. We concluded in the *Notice* that we have ample authority under the Communications Act to impose joint planning requirements to the extent we find necessary to carry out the purposes of the Act and our communications policy goals.[69] Most parties fully support this conclusion, and none mounts any substantial challenge to it. We therefore reiterate our conclusion that limited joint planning, as described below, for ensuring the just and reasonable administration of interconnection arrangements is well within our authority to require.

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[65] AT&T Comments at 31.

[66] DOJ Comments at 31.

[67] Accreditation of the T-1 Committee by ANSI became effective on Sept. 20, 1984.

[68] The parties commenting on NSEP include AT&T, ECSA, Mid-Rivers Telephone Coop and North Pittsburgh Telco., Secretary of Defense, DCA, Telephone and Data Systems Inc., USTA, PSC of Wisconsin.

[69] *See Notice*, 94 FCC 2d at 314-16.

2. Standards for Limited Joint Planning

71. In the *Notice* we proposed that joint technical planning among carriers be limited to establishing performance and physical parameters at the EC/IXC interface only, under a mechanism built about the ECA. We further stated that:

> It is our tentative belief that this Commission should be assigned responsibilities and functions regarding the joint planning activities of the association which are designed to ensure that the association does not operate in a manner which frustrates the goals and policies which we are establishing. This result can be achieved without requiring that this Commission be given membership on the association.[70]

We cited previous examples of successful joint planning, stating:

> Forms of joint action by carriers, in some cases under this Commission's sponsorship, and in many cases by the carriers themselves, have historically proved necessary in telecommunications to achieve important objectives: development of industry-wide technical standards, operating principles, administrative procedures, and maintenance procedures; informal resolution of service and maintenance disputes which may arise where there is divided responsibility for elements of a joint through service; development of standby procedures and facilities to support extraordinary communications requirements (*e.g.*, NSEP communications); and development of appropriate forecasting and circuit requirements amalgamation procedures to facilitate planning for construction of new facilities with relatively long "lead" times.[71]

72. We recognized in the *Notice* that limited joint planning poses potential risks related to the diminution of innovation and competition, and that the decision to adopt such a policy necessarily entails a balancing of these risks and the advantages of joint planning cited in para. 71, *supra.* The comments and replies of the parties are largely in agreement that the structural mechanisms for limited joint planning proposed by ECSA would significantly reduce the risks of such planning, while substantially preserving its advantages.[72] Thus, we find no reason to alter our tentative conclusion in the *Notice* that "the advantages to be gained from joint planning, as well as the short-term dangers posed by disruptions in this planning, outweigh the potential risks involved and point toward the conclusion that joint planning under the aegis of this Commission will serve the public interest."[73]

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[70] *Id.* at 317.

[71] *Id.* at 311.

[72] ECSA summarizes its structural philosophy as follows: "Limited joint planning under the auspices of the ECSA-sponsored and ANSI-accredited T-1 Committee, which has the responsibility for interconnection standards formulation, is open to all parties with a direct and material interest in that process and activity, without dominance by any single interest." ECSA Comments at 11. The T-1 Committee membership will be voluntary and will be open to all who may be concerned. *See* notes 75, 79, *infra.*

[73] *Notice*, 94 FCC 2d at 314.

73. With regard to NSEP functions, some new forms of planning among carriers will be required. AT&T, in the past, had taken a leading role in planning the participation of the telephone industry in NSEP communications. Implementation of the MFJ now requires the creation of new institutional arrangements for developing administrative mechanisms and maintaining emergency communications capabilities.

74. In this Order, we approve two joint planning mechanisms: (a) the ECSA-sponsored and ANSI-accredited T-1 Committee, and (b) the NCM to accomplish the technical planning associated with provision of NSEP communications.[74] We intend to minimize the imposition of additional regulatory rules or standards. While recognizing that experience may require future responses from the Commission, we accept today both the T-1 and NCM planning entities as responsive to our statutory responsibilities.

3. Structure for Limited Joint Planning for EC/IXC Interconnection

75. The record in this proceeding indicates that the parties are uniformly supportive of replacing our proposed joint planning mechanism with that proposed by ECSA. The voluntary membership of the T-1 Committee would, according to the parties, specifically address the concerns raised in our *Notice* by providing a forum in which the interests of all entities concerned with the development of technical standards would be heard and addressed.

76. In addressing the ECSA proposals, the parties provide sufficient arguments to demonstrate that a planning mechanism based upon the T-1 Committee structure (with its broad membership base) would minimize the potential for anticompetitive abuses resident in the ECA-based structure, which had been proposed in the *Notice.* The T-1 Committee includes and encourages the fullest industry representation of equipment manufacturers, IXCs, and other users of exchange access service as participants.[75]

77. The agendas of the T-1 Committee will be developed by its members and, therefore, should be responsive to their needs for administration of interconnection procedures, technical standards for provision of interconnection, design and operational standards relating to interconnection equipment and systems, and related administrative and maintenance procedures. The primary purposes of this limited joint planning coordination should be to make adjustments to interconnection processes on an

[74] *See Id.* at 299.

[75] The composition of the T-1 Committee membership, as of Oct. 9, 1984, was: ECs (88); IXCs and resellers (19); manufacturers and vendors (17); users and general (37); interests from U.S. and Canada (15). Source: *Fiscal Year 1984, Report of Directors, ECSA*, Oct. 9, 1984.

ongoing basis in order to achieve operational efficiency, to promote nationwide compatibility, and to anticipate future needs and problems so that adjustments can be planned.

78. Based on our review of the structure, membership, functions, and procedures of the ECSA-sponsored and ANSI-accredited T-1 Committee, we find that is an appropriate organization for developing voluntary technical interconnection standards.[76] As described by ECSA, the T-1 Committee will have the following characteristics: (1) it will focus on developing "standards at the point of interconnection for 'external' interface with interexchange carriers, customer premises equipment, and information vendors";[77] (2) it will "examine physical, electrical, mechanical, and functional characteristics of external interface standards and will establish the minimum standards to ensure proper interconnectivity and interoperability of services and equipment";[78] (3) its membership "will be open to all parties with a direct and material interest in the formulation of interconnection standards, without dominance by any single interest."[79] The Commission will not participate as a member of the T-1 Committee. The proposed T-1 Committee mechanism, with its open and voluntary membership requirements, appears to satisfy our concerns regarding the full participation in joint planning by affected parties and the exposure of joint planning operations to public scrutiny. We shall, however, monitor the industry standard setting process and, if necessary, provide regulatory review.

79. Furthermore, we have concluded that the interconnection coordination activities and the organizational structure for limited technical planning that we approve in this Order are consistent with the antitrust laws. The parties discuss limited joint planning in terms of providing an association or procedural mechanism that would safeguard against the possibility of anticompetitive abuses by eliminating or reducing opportunities for restraint of trade, price-fixing, market allocation and other exclusionary practices. They generally suggest that an appropriate joint planning association would require broad representation to minimize antitrust concerns and refer to the structural and procedural safeguards of the T-1 Committee, which, they emphasize, are in accord with antitrust

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[76] ECSA Comments, Appendix II, Exhibit A, (Procedures for the T-1 Committee of the Exchange Carrier Standards Association) at 1.

[77] ECSA Comments at 13.

[78] *Id.* at 14.

[79] *Id.* at 11. Exhibit A of the ECSA By-Laws cites the following entities as having direct and material interests: "(i) exchange carriers; (ii) interexchange carriers; (iii) relevant equipment manufacturers; (iv) vendors of relevant products; (v) state and federal regulatory agencies; (vi) the United States Department of Defense; (vii) user groups; (viii) professional technical organizations; and (ix) other groups that have a general interest in the exchange carrier industry." Exhibit A at 1.

policies, and are responsive to the Commission's antitrust concerns.[80] Additionally, IBM, GTE (Sprint), ITT (COINS) and Western Union, encourage the Commission to participate and maintain regulatory oversight responsibilities. ANSI points to *Revised Circular A-119*, October 27, 1982, which directs government agencies to adopt voluntary standards that are consistent with statutory obligations and goals. Mid-Rivers Telephone Cooperative, Inc., North Pittsburgh Tel. Co., and the PSC of Wisconsin submit that direct Commission regulatory involvement in the interconnection process is unnecessary and that an ECSA/ANSI accredited organization is fully consistent with antitrust principles and policies. DOJ asserts that:

> properly structured and narrowly focused joint ventures for dealing with matters such as interconnection standards are usually consistent with the antitrust laws. Care must be taken, however, that the joint venture does not overflow into areas where innovation and diversity should continue unabated . . . . The various exchange carriers should be able to experiment with new interconnection arrangements and to adopt particular system designs that best meet the demands of their customers (the interexchange carriers) and of their subscribers within the overall framework of a compatible and efficient network . . . . [S]o long as compliance is voluntary, the exchange carriers will be free to act on their own incentive to subscribe only to those standards which actually enhance the efficiency of their networks.[81]

80. It has been our intent in fashioning the structure necessary to achieve limited joint planning to assign to the association, functions which are important for the provision of efficient planning but which will not create a basis for anticompetitive conduct. It also should be noted that, although it is true that competition is an important factor which should be given weight in the administration of the Act, this Commission also is required by the public interest standards of the Act to consider factors other than competition, such as the efficiency of the communications network, the provision of reliable service to the public, and the future needs of carriers and users. In sum, we believe that our endorsement of the joint planning procedures outlined in this Order is consistent with our responsibility under the Act, and that use of such procedures will not raise antitrust issues. Accordingly, we approve the T-1 Committee as the instrument for implementing the limited joint planning approach proposed in the Notice and endorsed by the industry.

4. Joint Planning for NSEP Communications Capabilities

81. A number of parties have addressed the concerns we have raised regarding the proper coordinating mechanism to ensure continuity of

[80] *See* Comments of Rural Telephone Coalition, SNETCO, Rochester Telephone Co., USTA, American Satellite Co., TDS, Centel, United Telephone System, ECSA, IEEE, USAB, ANSI, MCI, USTA, Northern Telecom Inc., U.S. Telephone Inc., Utilities Telecommunications Council, TRT, API, Association of Data Communications Users, and IBM.

[81] DOJ Comments at 31, 34, 35.

emergency communications bearing upon national defense and emergency preparedness. The Commission recognizes the need for planning among carriers to create administrative mechanisms and standby capabilities to support such communications. We concur with the parties that we should adopt the industry's response to Executive Order No. 12382 (dated Sept. 13, 1982), which directs the National Communications System, headed by the Secretary of Defense, to develop a post-divestiture NSEP plan.[82]

82. The general agreement among parties to form the NCM, composed of government and industry representatives who will jointly provide communications capabilities and ensure continuity of national facilities during emergency conditions, also resolves the issues raised in the *Notice*[83] regarding antitrust concerns. The DOJ has accepted the NCM plan.[84] The carriers and the government agencies assigned responsibility for NSEP have acted to plan and implement NSEP communications mechanisms that will meet national requirements. As in the case of the T-1 Committee activities, described in paras. 75-78, *supra*, we will continue to monitor the NSEP planning process and, as necessary, provide regulatory review and approval of whatever executive coordinating actions are taken in response to Executive Order 12382.[85]

V. Tariff Requirements

A. Positions of Parties

83. In the *Notice* we requested that parties consider what level of information on interconnection should be included in ECs' access tariffs. The consensus of the commenters is that the Commission should limit its tariff filing requirements to the provision of basic technical interconnection information and reject unnecessarily rigid rules that would only necessitate frequent waiver requests, especially in the case of small and rural companies. AT&T gives examples of "practical" tariff inclusions, such as identifying whether an interconnection is a trunk-side or line-side arrangement, what signalling methods are available, and whether seven digits or fewer are required of the customer.[86] Many parties state that

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[82] AT&T, ECSA, Mid-Rivers Telephone Corp., North Pittsburgh Telco, Telephone and Data Systems, Inc. DOJ, USTA, ICA. PSC of Wisconsin, Secretary of Defense.

[83] See *Notice*, 94 FCC 2d at 321-322.

[84] Letter from Assistant Attorney General, Antitrust Division, U.S. Department of Justice, to Manager, National Communications System, dated June 1, 1983.

[85] While we today provide a framework for NSEP planning, we are not now specifying in detail the types of planning that will be required, nor the voluntary and regulatory administrative and other mechanisms that may prove necessary to carry out such planning. We will leave the development of resolution of such issues, in the first instance, to the NCM planning group we approve in this Order. *See Notice*, 94 FCC 2d at 299.

[86] AT&T Comments at 58.

complex, technical details of multi-featured services in tariffs would be unnecessary and burdensome. This material, commenters suggest, would be of marginal usefulness, and especially since there are other sources or references for such data.[87] MCI suggests that to avoid confusion either a general or specific reference to Part 68 in the tariffs should be required.[88] SNETCO states that tariffs should only reference physical, technical, and operational aspects of interconnection.[89]

B. Discussion

84. In the *Notice*, we noted that a variety of federal tariff-related interconnection policies governing ECs have traditionally been manifested in AT&T's interstate tariffs, to which all ECs concurred for the joint provision of interstate service. However, as a competition for interstate service continues to evolve, such a pattern of concurrence may no longer be common. To prevent confusion to the public, we proposed that the ECs' interconnection practices be reflected in their interstate exchange access tariffs, noting that such a requirement would impose minimal (if any) burden on such carriers, as they were obliged to file (or to concur in) access tariffs in any event.

85. Our proposals in this area were necessary because it was unclear whether any EC tariffs (or tariffs in which ECs would concur) for interstate service would continue to manifest these carriers' interconnection practices pursuant to our long-standing interconnection orders. Since that time, however, the ECs have implemented our proposals and have included (or referenced) in their interstate exchange access tariffs language comparable to the interconnection-related language in AT&T's pre-divestiture interstate tariffs. Thus, this is not a controversial matter. But, to ensure that there is no confusion in the future, we shall make final our tentative conclusion in the *Notice* that ECs' interconnection practices, as prescribed by this Commission, must be reflected in their interstate exchange access tariffs.[90]

86. A related issue raised in *Notice*, namely, whether we should require that the BOCs treat resellers no differently from facilities-based IXCs with respect to access number coding, has subsequently become moot. At that time, it was contemplated that 10XX coding, which is capable of supporting access to no more than 100 IXCs, would be used for access to the services of non-predesignated carriers. Since there are more than 100 resellers, the supply of available codes could have been rapidly exhausted. Since the BOCs have since revised their plans to utilize 10XXX

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[87] PSC of Wisconsin, Southern New England Telephone Co. (SNETCO), AT&T, Rural Telephone Coalition.

[88] MCI Comments at 19.

[89] SNETCO Comments at 7.

[90] *See* also, Access and Divestiture Related Tariffs, 97 FCC 2d at 1111 (1984).

coding and will make such codes available to resellers and facilities-based carriers alike, we do not anticipate exhaustion of access codes in the foreseeable future. Accordingly, in light of the implementation of this expanded code space, we need make no determination on this issue.

VI. Regulatory Flexibility Certification

87. In the *Notice*, we invited interested parties to comment upon our initial regulatory flexibility analysis. We stated our legal authority for taking action in this proceeding, and noted that "the policy objectives of the Regulatory Flexibility Act are also encompassed in Sections 2(b) and 203(a) of the Communications Act of 1934, the provisions of which are intended to relieve many small telephone companies from various reporting and other requirements established in the Communications Act."[91]

88. We hereby certify that the Regulatory Flexibility Act is not applicable to small telephone companies, as defined, because they are monopolies in their own service areas. The Act incorporates the definition of a "small business" in Section 3 of the Small Business Act as the definition of a "small entity." The latter definition excludes any business that is dominant in its field of operation. ECs, even small ones, enjoy a dominant monopoly position in their local service area. Moreover, the actions we are taking in this proceeding with respect to (a) the implementation of equal access, and (b) the modification of tariffs to reflect equal access interconnection, are designed that the interests of small telephone companies are protected — by recognizing their unique financial status *vis a vis* that of the BOCs and the larger independent telephone holding companies.

VII. Ordering Clauses

89. Accordingly, IT IS ORDERED That, pursuant to Sections 4(i), 4(j), 201-205, 213, 218, 220, and 403 of the Communications Act of 1934, 47 U.S.C. §§154(i), 154(j), 201-205, 213, 218, 220, and 403, the policies, rules, and requirements set forth herein ARE ADOPTED.

90. IT IS FURTHER ORDERED, That the Secretary shall cause this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

[91] 94 FCC 2nd 328-329.

Civic Participation, Effect of
Comparative Coverage Issue
Diversification of Control of Mass Media
Ownership and Management, Integration of

Review Board affirmed ALJ's comparative selection of FM permittee whose slight overall ownership integration preference exceeded opponent's very slight comparative coverage preference. No credit was given to contingent integration proposal. Residence and civic participation were evaluated separately and 7-15 year old activities were credited.

—*Northern Sun Corporation*
MM Docket No. 83-1050

FCC 85R-23

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Northern Sun Corporation Billings, Montana	MM Docket No. 83-1050 File No. BPH-820503AP
Billings Media Company Billings, Montana	MM Docket No. 83-1051 File No. BPH-820811AA
Bert E. Arnlund, d/b/a Arnlund Broadcasting Billings, Montana	MM Docket No. 83-1053 File No. BPH-820907AG
For Construction Permit for a new FM Station	

Appearances

Dennis F. Begley and *Cheryl A. Kenny*, on behalf of Northern Sun Corporation; *James L. Oyster*, on behalf of Billings Media Company; and *Robert L. Olender* and *Lee J. Peltzman*, on behalf of Bert E. Arnlund, d/b/a Arnlund Broadcasting.

DECISION

Adopted: March 1, 1985; Released: March 13, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. By Initial Decision (I.D.), FCC 84D-62, released August 31, 1984, Chief Administrative Law Judge Thomas B. Fitzpatrick (ALJ) granted the application of Northern Sun Corporation (Northern) for authority to construct a new FM broadcast station on Channel 279 at Billings, Montana, and denied the mutually exclusive applications of Billings Media Company (Media) and Bert E. Arnlund, d/b/a Arnlund Broadcasting (Arnlund). Having resolved a technical engineering issue in Media's favor, the ALJ concluded that all three applicants were basically qualified and were entitled to 100% quantitative ownership integration credit under the "best practicable service" rubric of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965). I.D., Concls., para. 3. However, he concluded that Northern's qualitative enhancement preferences for civic participation and broadcast experience outweighed Arnlund's local residence preference (Media was awarded no preferences) and that Northern's resulting overall ownership integration preference was comparatively more significant that a slight engineering coverage preference awarded to Arnlund. I.D., Concls., para. 9 and n. 23.

2. The proceeding is now before the Review Board on exceptions filed by all three applicants. The Board has reviewed the I.D. in light of the exceptions and reply briefs, the oral argument held December 14, 1984,[1] a subsequent petition to enlarge issues filed by Arnlund against Northern and Northern's response, and our examination of the record. We adopt the findings of fact and conclusions of law in the I.D., except as modified herein, and we affirm the grant of Northern's application.

3. We first *sua sponte* remove Media from comparative consideration in this case by reversing the I.D.'s holding (Finds., para. 28 and n. 8) that Media is entitled to any quantitative integration credit for its contingent integration proposal, under which J. Stephen McClure, Media's 100% owner and proposed full-time general manager, would be available only if a Newberry, South Carolina FM application in which he was also proposed as full-time general manager were not granted. We recently held in *Metro Broadcasting, Inc.*, 57 RR 2d 440, 450-51 (Rev. Bd. 1984), citing *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 431, 55 RR 2d 627, 634 (Rev.

[1] By letter dated December 5, 1984, Media elected not to participate in the oral argument but affirmed the continued prosecution of its application based on its exceptions and brief.

Bd. 1983), *rev. denied*, 56 RR 2d 1394 (1984), that such a "conditional and uncertain" undertaking, which is avowedly secondary to another integration proposal, will not be credited. In *Metro*, the application with the primary integration proposal was dismissed only 11 days before the *Metro* hearing and the other parties had come to rely on the non-availability of the principal in question; to have allowed this eleventh-"day" conversion of a contingent proposal into a permanent one would have been a clearly prohibited post-cutoff date comparative upgrading with no equitable justification. The facts in the instant case are even more egregious because here the application containing McClure's primary integration proposal was not dismissed until *three months after* the hearing in this proceeding took place and the record was closed.[2] Lacking any integration credit, Media's application is reduced to a comparative cipher about which no more need be said.

4. As between Northern and Arnlund, the exceptions challenge six of the ALJ's principal conclusions, but none requires extensive discussion. First, Media argues that Northern should be assessed a comparative diversification of media control "demerit" for the ownership interests of William R. Reier, Northern's 100% owner and proposed full-time general manager, in Stations KBOZ and KBOZ-FM, Bozeman, Montana, despite Reier's timely and unconditional pledge to divest these interests. Media's theory — that such divestiture commitments are not effective where a controlling ownership interest is involved — is contrary to established Commission precedent, and its exception will be denied. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 813-14, 51 RR 2d 409, 419 (Rev. Bd. 1982), *rev. denied*, FCC 83-368, released September 15, 1983, *rev'd in part and remanded on other grounds*, No. 83-2067 (D.C. Cir. February 5, 1985); *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 488, 55 RR 2d 1299, 1302 (Rev. Bd.), *recon. denied*, 56 RR 2d 1260 (Rev. Bd. 1984). However, because the subject stations have not yet been sold, and in order to ensure compliance with its representation, we endorse the divestiture condition placed on Northern's grant by the ALJ. I.D., Ordering Clauses; *see Vacationland Broadcasting Co., Inc., supra*.

5. Next, both Media and Northern question the ability of Arnlund's 100% owner, Bert E. Arnlund, to effectuate his 40-hour per week integration proposal as general manager because of a second commitment to work "30 hours at best" per week at his automobile dealership (Tr. 167). Although the ALJ specifically concluded that Arnlund intends to reduce his auto dealership involvement to 30 hours per week and has arranged for his general sales manager to run the dealership, I.D., Concls., para. 3,

[2] The hearing was held on April 24, 1984, and the record was closed on that date. Tr. 186. McClure's Newberry application was dismissed by Memorandum Opinion and Order, FCC 84M-3145, released July 17, 1984.

and Finds., para. 34, the exceptors assert that "no evidence exists" as to how Arnlund will accommodate these two commitments and that, therefore, Arnlund is not entitled to any integration credit. A 70-hour work week proposal teeters on the outer limits of credibility, *compare Bradley, Hand and Triplett*, 89 FCC 2d 657, 51 RR 2d 383 (Rev. Bd. 1982) (50-60 hour week fully credited), *with Berryville Broadcasting Co.*, 70 FCC 2d 1, 44 RR 2d 1325 (Rev. Bd. 1978) (70-hour work week not credited). However, we need not reach this exception because, as we explain *infra*, even if Arnlund were to retain its 100% full-time integration credit (which we will assume *arguendo*), it would still finish behind Northern in the overall comparative evaluation.

6. We now turn to the challenges to the qualitative enhancement preferences that the ALJ awarded to Northern and Arnlund — a moderate civic participation preference and a slight broadcast experience preference for Northern and a moderate local residence preference for Arnlund. I.D., Concls., paras. 4-6, 9. In its limited exceptions, Northern contends that it deserves a substantial preference for William Reier's "23 years of extensive and meaningful broadcast experience, having held management positions as Sales Manager, Program Director, and General Manager," I.D., Concls., para. 6, compared to Arnlund's total lack of previous broadcast experience. We affirm the ALJ's award of a slight preference. Here, as in *Ruarch Associates*, 56 RR 2d 1593, 1596 (Rev. Bd. 1984), and *Jerome Thomas Lamprecht*, FCC 84R-93, released December 17, 1984 (Rev. Bd.), para. 13, the nature, duration, 100% ownership, and comparative size of Northern's enhancement warrant the "maximum allowable significance," 56 RR 2d at 1596, but as we also pointed out in *Lamprecht* and *MTF Enterprises*, FCC 84R-69, released October 5, 1984 (Rev. Bd.), para. 9, given the minor importance of broadcast experience among enhancement elements, *Policy Statement*, *supra*, 1 FCC 2d at 396, 5 RR 2d at 1910, even maximum credit translates into only a minor or slight preference, lest qualified newcomers be discouraged from entering the field.

7. As to Northern's civic participation preference, Arnlund asserts that it, rather than Northern, deserves this preference because "while Bert Arnlund's involvement in Billings' civic affairs has been continuous and uninterrupted from 1972 until the present" and has required "considerable amounts of his time and energies," "William Reier ceased all civic involvement within Billings and the surrounding area as of 1975" (he began in 1967), and Commission policy favors current civic involvement and "will disregard previous civic participation which is seven years removed or older," citing *Veterans Broadcasting Co., Inc.*, 38 FCC 25, 61, 4 RR 2d 375, 417 (1965). Arnlund Br. at 5, 6, 8. The ALJ's findings fully and accurately describe Arnlund's and Reier's civic activities at I.D.,

Finds., paras. 41-43 and 23-24, respectively, and need not be repeated here. Our review confirms the ALJ's conclusion that Reier's activities, though not of recent vintage, surpass Arnlund's both in quality and quantity. I.D., Concls., para. 5. And Reier's substantial advantage is not significantly diminished by the subsequent 7-year hiatus between Reier's departure and his filing of the Northern application. *Veterans Broadcasting Co., Inc., supra*, does not stand for the proposition that seven-year-old civic participation will be "disregarded," nor does *Radio Jonesboro, Inc.*, 55 RR 2d 991 (Rev. Bd. 1984), *rev. denied*, FCC 85-74, adopted February 14, 1985 (Comm'n), also cited by Arnlund. Rather, as correctly noted by the ALJ, *Radio Jonesboro* holds that the Commission will "disregard" civic participation that is "antediluvian," citing *Ottumwa Broadcasting Co.*, 92 FCC 2d 1011, 52 RR 2d 1447 (Rev. Bd. 1982)(25-year-old civic participation given no credit), and will "discount" participation that is seven years old or more, citing *Veterans*. 55 RR 2d at 994. Consistent with *Veterans*, we awarded "somewhat reduced credit" in *Radio Jonesboro, supra* at 994, for civic activities that predated the filing of the relevant application by *more than* seven years. Applying that standard here, Northern still warrants a moderate preference over Arnlund.[3]

8. Finally, Arnlund and Northern both attack Arnlund's moderate preference for local residence, Arnlund maintaining that it deserves a substantial preference over Northern, and Northern, that the two applicants are equal under this enhancement factor. The facts are simply that Arnlund has continously resided in Billings or within the Billings service area (especially on a ranch in Silesia, which is 23 miles from Billings) since 1970, while Reier lived in Billings from 1967 until 1975, moved 135 miles away to Bozeman (beyond the Billings service area), and now proposes to return to Billings if Northern's application is granted.[4] I.D., Finds., paras. 11, 25, 37, 39. As with civic participation, Arnlund argues that Reier's 1967-75 prior residence should be completely disregarded, citing *Veterans Broadcasting Co., Inc., supra*, and that his proposed future local residence does not warrant more than very slight

[3] The oldest activities at issue in *Radio Jonesboro* preceded the application-filing by 14 years. Here the oldest ones occurred 15 years before Northern's application.

[4] Arnlund's December 21, 1984 petition to enlarge issues attempts to challenge this "future residence" undertaking as a misrepresentation, essentially because Mrs. Reier has indicated a subsequent intention to apply for a television station license at Bozeman. In Northern's opposition, Mrs. Reier reaffirms her intent to move to Billings and points out that at no time has she represented to the Commission that she would remain in Bozeman should she apply for and obtain a Bozeman television license. The duty to come forward with a *prima facie* showing of deception is particularly strong where a misrepresentation issue is sought, *Alabama Citizens for Responsive Public Television, Inc.*, 73 FCC 2d 615, 46 RR 2d 408 (1979), and Arnlund has fallen short. Its petition is based on speculation and surmise but lacks factual support and will be denied. *See Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1099, 50 RR 2d 1251, 1258 (Rev. Bd. 1982).

credit. On the other hand, Northern maintains that while Arnlund's residence has been of longer duration that Reier's, it should essentially be regarded as low-credited service area residence because Silesia was admittedly Arnlund's "primary" residence from 1976 through 1983 — he lived there weekends from September to May or June and fulltime from May or June to early September — and because Arnlund was a fulltime resident of Billings only from 1970 to 1976 (Tr. 205) and since July 1983. We again affirm the ALJ's judgment. Under the *Veterans* and *Radio Jonesboro* cases, *supra*, it appears to us that Arnlund's 1970-1976 and Reier's 1967-1975 Billings residences are cross-cancelling, and we are left with Arnlund's unmatched Silesia/Billings service area and in-town residences from 1976 through 1983. We agree with the ALJ's refusal to equate Reier's occasional visits to Billings, reading a daily Billings newspaper, and regularly watching the news and public affairs programs of a Billings television station with Arnlund's actual service area/local residence of eight years' duration (and six days a week working in Billings), and conclude that a moderate preference appropriately gauges the level of Arnlund's enhancement superiority under the residence rubric.

9. The last exception pertains to the slight comparative coverage preference that the ALJ awarded to Arnlund based on the fact that it would provide a second aural service at night to 242 persons, while Northern would provide none, and would bring a third and fourth service to 391 more people than Northern. I.D., Concls., para. 7. Northern asserts that these differences are *de minimis* and deserve no preference at all, while Arnlund not surprisingly attempts to argue that its service advantage is of decisional significance and "certainly outweighs" Northern's broadcast experience qualitative preference. Arnlund Br. at 14. According to Arnlund, assuming *arguendo* that Northern and Arnlund receive offsetting moderate preferences under the local residence and civic participation qualitative enhancement elements of their ownership integration proposals, Arnlund's comparative coverage preference should weigh dispositively in its favor. We disagree.

10. First, we must reduce Arnlund's coverage preference to very slight to conform with established precedent in cases where the new second, third, and fourth service advantages are so slight. *See Caldwell Broadcasting Corp.*, FCC 85R-1, released January 15, 1985 (Rev. Bd.), para. 23; *Family Broadcasting Group*, 93 FCC 2d 771, 53 RR 2d 662 (Rev. Bd. 1983), *rev. denied*, FCC 83-559, released November 29, 1983; *Radio Jonesboro, Inc.*, *supra*; *CJL Broadcasting Co.*, 88 FCC 2d 750, 50 RR 2d 1159 (rev. Bd. 1981), *reversed on other grounds*, 54 RR 2d 1037 (Comm'n 1983). Second, in making our final comparative evaluation, we do not pit individual qualitative enhancement integration preferences against

comparative coverage preferences as if they were analogous; although both types of preferences are part of the *Policy Statement's* "best practicable service" rubric, the former is a subpart of the overall integration comparison while the latter is a complete comparative factor in its own right. Thus, based on the preceding treatment of the parties' integration exceptions and case precedent, we first affirm the ALJ's (implicit) conclusion that Northern is entitled to at least a slight overall integration preference versus Arnlund, *see Radio Jonesboro, Inc., supra*, 55 RR 2d at 996 n. 7, and paragraph 5, *supra*, and then separately hold that this integration preference clearly outweighs the very slight comparative coverage preference that we have awarded to Arnlund. *See Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 656, 53 RR 2d 953, 963 (Rev. Bd. 1983), *rev. denied*, FCC 84-161, released April 13, 1984, *appeal pending sub nom. James U. Steele* v. *FCC*, No. 84-1176 (D.C. Cir. May 10, 1984). As a result we affirm the ALJ's ultimate conclusion that Northern prevails over Arnlund (and Media) in the "best practicable service" comparison and that grant of Northern's application will best serve the public interest, convenience, and necessity.

11. ACCORDINGLY, IT IS ORDERED, That the petition to enlarge issues and reopen the record filed by Bert E. Arnlund, d/b/a Arnlund Broadcasting on December 21, 1984 IS DENIED;

12. IT IS FURTHER ORDERED, That the application of Northern Sun Corporation (File No. BPH-820503AP) for authority to construct a new FM broadcast station at Billings, Montana IS GRANTED, and the applications of Billings Media Company (File No. BPH-820811AA) and Bert E. Arnlund, d/b/a Arnlund Broadcasting (File No. BPH-820907AG) ARE DENIED; and

13. IT IS FURTHER ORDERED, That grant of Northern Sun Corporation's application IS SUBJECT to the condition that Northern Sun Corporation WILL NOT BEGIN program tests until it has divested itself of all interests in, and severed all connections with, Stations KBOZ and KBOZ-FM, Bozeman, Montana.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

FCC 84D-62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Northern Sun Corporation Billings, Montana	MM Docket No. 83-1050 File No. BPH-820503AP
Billings Media Company Billings, Montana	MM Docket No. 83-1051 File No. BPH-820811AA
Bert E. Arnlund, d/b/a Arnlund Broadcasting Billings, Montana	MM Docket No. 83-1053 File No. BPH-820907AG
For Construction Permit for a New FM Station	

Appearances

Dennis F. Begley on behalf of Northern Sun Corporation; *James L. Oyster* on behalf of Billings Media Company; *Aaron Shainis* and *Robert L. Olender* on behalf of Bert E. Arnlund, d/b/a Arnlund Broadcasting; and *Brian Kilbane* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
CHIEF ADMINISTRATIVE LAW JUDGE THOMAS B. FITZPATRICK

Issued: August 28, 1984; Released: August 31, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Northern Sun Corporation (Northern Sun), Billings Media Company (Billings Media) and Bert E. Arnlund, d/b/a Arnlund Broadcasting (Arnlund), for a construction permit for a new FM station to be operated on Channel 279C (103.7 MHz) at Billings, Montana.

2. These three applications, as well as applications filed by B. J. Runkle (Runkle), Mesa Broadcasting Associates, Ltd. (Mesa), Stromquist Broadcast Services, Inc. (Stromquist) and Benny Bee, were designated for hearing in the *Hearing Designation Order* (*HDO*), released October 12, 1983.[1] The following issues were specified:

1. If a final environmental impact statement is issued with respect to Stromquist which concludes that the proposed facilities are likely to have an adverse effect on the quality of the environment:

   (a) To determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules; and

   (b) Whether, in light of the evidence adduced pursuant to (a) above, the applicant is qualified to construct and operate as proposed.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Northern Sun, Mesa, Arnlund, Runkle and Stromquist would constitute a hazard to air navigation.

3. To determine the areas and populations which would receive FM service of 1.0 mV/m or greater intensity, together with the availability of other primary aural services in such areas, under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.[2]

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

3. By *Memorandum Opinion and Order* (FCC 84M-816), released February 16, 1984, the Presiding Judge added the following issue against Billings Media:[3]

6. To determine whether the engineering portion of the application filed by Billings Media complies with the Commission's Rules and whether, in light of the evidence adduced, Billings Media is technically qualified to be a Commission licensee.

4. Runkle's application was dismissed with prejudice for failure to prosecute by *Order* (FCC 84M-131), released January 12, 1984. At their own requests, the applications of Benny Bee, Mesa and Stromquist were dismissed with prejudice, pursuant to *Order* (FCC 83M-4552), released December 9, 1983; *Order* (FCC 84M-206), released January 16, 1984; and

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[1] The *HDO* was published in the Federal Register on October 17, 1983, 48 Fed. Reg. 47006.

[2] The Commission noted that technical data submitted by the applicants indicated that there would be a significant difference in the size of the areas and populations which would receive service from the respective proposals.

[3] The burden of proceeding with the introduction of evidence and the burden of proof were placed on Billings Media.

Order (FCC 84M-959), released February 27, 1984, respectively.[4]

5. The air hazard issue specified against Northern Sun and Arnlund was resolved in their favor by summary decision in *Order* (FCC 83M-4878), released December 30, 1983.

6. A prehearing conference was held on December 28, 1983. A hearing session was held on April 24, 1984 and the record was closed on that date (Tr. 186). Proposed Findings of Fact and Conclusions of Law and Reply Findings were filed on June 5 and 25, 1984, respectively, by Northern Sun, Billings Media and Arnlund.

Findings of Fact

I. Issue 6 - Whether Billings Media Is Technically Qualified

7. As Noted, *supra*, by *Memorandum Opinion and Order* (FCC 84M-816), released February 16, 1984, the Presiding Judge, upon ruling that there was a substantial question as to whether the engineering portion of Billings Media's application had been properly prepared, enlarged the issues to determine whether the engineering portion of Billings Media's application complies with the Commission's Rules and whether Billings Media is technically qualified to be a broadcast licensee. Billings Media petitioned for leave to amend its application to bring the engineering portion of its application into compliance with the Commission's Rules. The petition was granted and the amendment was accepted by *Memorandum Opinion and Order* (FCC 84M-1833), released April 16, 1984.

8. The amendment was received in evidence (Billings Media Ex. 5). The Presiding Judge ruled that this issue was resolved in favor of Billings Media (Tr. 84-87).

II. Issue 4 - The Comparative Issue

(a) Northern Sun Corporation

9. Northern Sun is composed of the following officers, directors and stockholders (Northern Sun Ex. 1):

Name of Principal	*Position Held*	*Percentage of Ownership*
William R. Reier	President/Director	100%
Dale Fasching	Vice President/Director	0
Karen L. Reier	Vice President/Director	0
Linda A. Mooney	Secretary/Treasurer/Director	0

10. William R. Reier, the 100% stockholder of Northern Sun, proposes to move to Billings and to serve as full-time General Manager of the Billings station, devoting a minimum of 40 hours per week to the station.

[4] The dismissal of the Stromquist application mooted issue 1, the environmental impact issue, relative to the Stromquist proposal.

As General Manager, he will be responsible for all areas of station management, including programming, sales and finances. He also will have primary responsibility for ascertaining community needs and problems, and designing programming to respond to those needs (Northern Sun Ex. 3).[5]

11. Reier was born in Stillwater, Minnesota on January 4, 1940 and lived in Billings from 1967 to 1975, when he relocated to Bozeman, Montana, where he presently resides.

12. Reier attended St. Cloud State College in St. Cloud, Minnesota for two years, majoring in Business. In 1960 he enrolled in the Brown Institute of Broadcasting and Electronics in Minneapolis, Minnesota, where he received training in radio announcing, news reporting, advertising sales and commercial copywriting. He graduated from the Brown Institute in 1961.

13. Upon graduation from the Brown Institute, Reier began working as a full-time radio announcer and part-time advertising salesman at Station KRSD in Rapid City, South Dakota. He also wrote copy and produced public service announcements for various community organizations as part of his duties at Station KRSD.

14. In the spring of 1962, Reier began working as an advertising salesman at a new radio station in Rapid City, Station KIMM. Reier acquired knowledge of the problems of establishing a new broadcasting facility in a competitive market. Shortly after joining Station KIMM, Reier was promoted to Sales Manager, with the responsibility for hiring and directing a three-person sales staff. He left the station in 1963 (Tr. 64-65).

15. In 1963 Reier became an Account Executive at Station WDGY, Minneapolis, Minnesota. His responsibilities included selling advertising at the advertising agency level.

16. In 1965 he became Sales Manager and Program Director of Station KWEB, Rochester, Minnesota. Reier's responsibilities included sales, news, public affairs, sports and other elements of programming planning and implementation.

17. In 1967 Reier became General Manager of Station KOOK, Billings, Montana. He was responsible for the operation of the station, including ascertainment of community needs, development of programming to meet those needs and the station's involvement in community affairs. He supervised news, sports and entertainment programming, as well as sales. As a member of the station's Community Program Advisory Committee, Reier interviewed community leaders concerning the needs and interests of Billings residents. In 1970 Reier initiated a one-minute program, "Billings Speaks," which was broadcast throughout the day. "Billings Speaks" permitted residents and leaders to voice their views on

[5] The findings set forth in paragraphs 10-25 are derived from Northern Sun Ex. 3.

the needs and problems of the Billings area. Reier was involved in the selection of the topics about which views were sought.

18. In 1972 Station KOOK changed ownership. Reier remained at the station as General Manager under the new owners. He continued to oversee station ascertainment and, on a yearly basis, conducted interviews of at least 25 community leaders in the Billings area. Moreover, he was in daily contact with area leaders concerning the station's programming and community involvement. In 1973 Reier was elected Vice President in charge of the operations of the company's other radio properties, Stations KBOM, Bismarck, North Dakota; KYJC, Medford, Oregon; and KBDF, Eugene, Oregon.

19. In 1975 Reier formed Northern Sun Corporation and employed a consulting engineer to search for an AM frequency that would serve Bozeman, Montana.[6] He was granted a construction permit for a station in Bozeman, oversaw the construction of the station and, on December 19, 1975, signed Station KBOZ on the air. In November 1981, Reier established Bozeman's first FM station, KBZN (later changed to KBOZ-FM).

20. Since 1975 Reier has been full-time General Manager of Stations KBOZ and KBOZ-FM, responsible for all areas of station management, including programming, sales and finances. In 1982 he established Station KLFM, Great Falls, Montana. However, he later sold the station as a result of his commitment to the Commission in this proceeding to divest himself of all his ownership interests in other broadcast stations.

21. During Reier's broadcasting career in Montana, he has been active in both the Montana Broadcasters Association (MBA) and the Rocky Mountain Broadcasters Association (RMBA). He has been a member of the MBA since 1967, a member of its Board of Directors for three years and was elected President of the Association in 1981. During his term as President of the MBA, in partnership with Montana State University and the Greater Montana Foundation, Reier established an annual awards competition designed to encourage excellence and reward outstanding achievement in all areas of broadcasting in the State of Montana.

22. Reier has been a member of the RMBA since 1967, when the Association was formed to address the problems of Rocky Mountain area broadcasters caused by the size and remoteness of the markets they serve. Reier represented Montana broadcasters on the Board of Directors of the RMBA for two years and testified before this Commission on behalf of small market stations on two occasions.

23. While a resident of Billings from 1967 to 1975, Reier was active in the following local civic organizations:

[6] No station was available in Billings at that time (Tr. 61).

Billings Jaycees. Reier was a member of the Billings Jaycees from 1967 to 1975, serving on the Program, Western Days, State Fair, Club House and Membership Committees. He established and was editor of the Jaycees' newsletter. He also developed an environmental awareness campaign called "Keep Montana Montana," a multi-media public service advertising promotion adopted as a state-wide project by the Montana Jaycees in 1973. Reier was elected to the Board of Directors of the Billings Jaycees in 1969 and was elected as the Outstanding Board Member in 1972. In 1974 the Billings Jaycees awarded Reier the Billings Distinguished Service Award (Outstanding Young Man in Billings) in recognition of his public service contributions to Billings.

Billings and Yellowstone County Boys Club. Reier was a member of the Board of Directors of the Boys Club in Billings during 1973-1974. He organized the effort to establish Station KBOY, an in-house radio station designed to encourage disadvantaged and minority youth in the Billings area to consider radio broadcasting as a career. He also was involved in the boxing program and was responsible for publicity surrounding the Annual Open House.

Eastern Montana College Elementary School For the Developmentally Disabled. For two years, 1972-1973, Reier and his family volunteered to become foster parents to a mentally and physically handicapped boy from Libby, Montana, to enable him to attend Eastern Montana College Elementary School in Billings.

Billings Lions Club. Reier was a member of the Lions Club from 1967 to 1972. He was involved in raising funds for the Club's charities in the Billings area by selling white canes on a street corner, selling light bulbs, working at the Lions Club's State Fair Booth for two years and participating in the Lions Club annual talent show for two years.

Junior Achievement. Reier was a member of the Board of Directors in 1970 and 1971. He established a radio company for local students. He was the radio company advisor for the organization during 1969-1970.

United Way. Reier was a member of the United Way's Advisory Committee for Publicity from 1972 to 1975 and was involved in fundraising for the Annual Campaigns of 1972 and 1973.

Downtown Billings Association. From 1967 to 1975, Reier was a General Member of this association of property owners and persons interested in the revitalization and promotion of the Billings downtown area.

School District No. 2 Broadcasting Career Center. Reier was a member of the Advisory Committee during the establishment of the vocational school (within the Billings School District) and its application for a radio station license.

Station KEMC. In approximately 1972, Reier was a member of the Advisory Committee of this public radio station owned by Eastern Montana College. He was involved in the establishment of the station's programming and technical characteristics.

Billings Rotary Club. Reier was a member of the Rotary Club from 1972 to 1975 and a member of its Information Committee during those years.

Billings Chamber of Commerce. Reier was a member of the Chamber from 1967 to 1975 and served on the Publicity and other committees during that period.

YMCA. Reier was a fundraiser for the YMCA in 1973 and 1974.

Billings Emergency News Network. Reier was involved in the establishment of the Billings Emergency News Network, a system to disseminate local emergency news

to the various media in the Billings area, originating with the law enforcement agencies.

Yellowstone Chapter, Montana Heart Association. Reier was involved in fundraising with the Association in 1971 and 1972.

Billings AAU Wrestling Club. Reier was one of the organizers of the Club in 1972 and served on the Fundraising Committee from 1972 to 1974.

Station KOOK Double Dribblers. Reier was a member and player for the basketball team, comprised of employees of Station KOOK, which played other teams in the Billings area. All funds raised by those games were donated to the community's charitable organizations.

PTA, Rose Park School. Reier was a member of the PTA from 1971 to 1975.

U.S. Savings Bonds. Reier was an advisor of the Publicity Committee in 1972.

Rose Park Little League. Reier was a member from 1971 to 1975 and a member of the Parents Volunteer Committee.

American Cancer Society. Reier was a publicity advisor in 1971 and 1972.

Salvation Army. Reier assisted with publicity and was a fundraiser for the Salvation Army in 1974.

Yellowstone Boys Ranch. In 1972 Reier was involved in broadcasting from the Boys Ranch Annual Open House.

American Lutheran Church. Reier was a member of the Church from 1967 to 1975.

24. During the period 1967-1975, Reier was a member of the Billings Advertising and Sales Association, an advertising trade organization of persons involved in retail advertising or in the media in the Billings area. He served as Chairman of the Association's Annual Awards Competition, a program designed to encourage and recognize professionalism and integrity in locally-produced advertising. He was Chairman of the Membership Committee, as well as the Chairman of the Annual Dinner which was a major means for raising money to promote quality advertising in the area. He was also Chairman of the Program Committee and represented the radio media at a community advertising workshop conducted on the campus of Eastern Montana College in Billings. He was a member of the Board of Directors of the organization from 1968 to 1972 and was elected President of the Association in 1971.

25. As noted, *supra*, Reier left Billings in 1975 when he built Station KBOZ, Bozeman, Montana. He maintains that he has always desired to return to Billings. He has attempted to keep in close contact with Billings, returning to the Billings area to visit his friends and associates there. He has also been a subscriber and daily reader of the Billings newspaper, the *Billings Gazette.* Reier also regularly watches the local news and public affairs programs aired by a Billings television station. He will move back to Billings prior to Commission grant of program test authority for his proposal (Tr. 55-58).

26. Northern Sun, the applicant in this case, is the licensee of Stations KBOZ(AM) and KBOZ-FM in Bozeman. However, in the event Northern

Sun's application is granted, Northern Sun and its principals will divest all of their interests in and sever all connections with those stations (Northern Sun Ex. 2; Northern Sun Ex. 3, pp. 10-11). It has already listed Stations KBOZ and KBOZ-FM for sale[7] (Tr. 58). Neither Northern Sun nor its principals have any other interest in or connection with any other broadcast station or media of mass communications (Northern Sun Ex. 2; Northern Sun Ex. 3, p. 11).

(b) Billings Media Company

27. Billings Media is a sole proprietorship owned by James Stephen McClure (McClure) (Billings Media Ex. 1).

28. McClure proposes to assume the position of full-time General Manager at his proposed station. He intends to move to Billings and to devote a minimum of 40 hours per week to that position. McClure's integration proposal was contingent. He was to be integrated into his Billings station only in the event that his Newberry, South Carolina application, in which he also proposed to serve as full-time General Manager, was not granted[8] (Tr. 78-79). As General Manager, he will be in charge of all day-to-day decisions and responsible for the overall operation of the station, including, but not limited to, programming, sales and personnel. As sole owner of the station, he will have the final decision on all matters affecting the station's operation (Billings Media Ex. 1).

29. McClure was born on June 20, 1955 in Greenville, South Carolina. He presently resides at #276, 15 Villa Road, Greenville, South Carolina, and has never been to Billings, Montana. He is a graduate of the University of South Florida in Tampa, Florida. He graduated in 1977 with a B.S. in Business Administration and a major in Management (Billings Media Ex. 3; Tr. 89).

30. McClure is presently self-employed as a packaging consultant and broker. He has been employed in this field since graduation from college in 1977. In 1982 he started a business consulting and brokering equipment to colleges and universities in the United States. Most of his time is spent in the packaging field. However, he is also selling microcomputer equipment as a sideline business. He holds a third-class radio-telephone operators permit. McClure has no broadcast experience. He has a knowledge of the broadcast equipment industry (Billings Media Ex. 3).

31. McClure has no ownership or other interest in or connection with any medium of mass communication, including but not limited to

[7] Reier represented that, if necessary, he would surrender the licenses to Stations KBOZ and KBOZ-FM, in order to meet a Commission imposed condition to a grant of his Billings application (Tr. 61-62).

[8] However, by *Memorandum Opinion and Order* (FCC 84M-3145), released July 17, 1984, Judge Stirmer dismissed, with prejudice, the application of J. Stephen McClure, d/b/a Newberry Media Company, for a new FM station at Newberry, South Carolina.

broadcast, cablecast, print, satellite or microwave media (Billings Media Ex. 2).

32. McClure has never contacted anyone in Billings concerning the proposed station and never personally performed any research concerning the needs of the Billings community (Tr. 89-90). His father contacted Edward M. Johnson Associates to file McClure's applications for Billings, Montana, Newberry, South Carolina, and Bismarck, North Dakota (Tr. 91). His father consulted with Johnson as to various aspects of the Billings application. McClure never spoke to Johnson (Tr. 92-94). McClure relied on Johnson to prepare the Billings application and he did not see the application or become aware of its contents until it was given to him for his signature (Tr. 92-93, 96).

(c) Bert E. Arnlund, d/b/a/ Arnlund Broadcasting

33. Bert E. Arnlund, d/b/a Arnlund Broadcasting, is an individual applicant for a construction permit (Arnlund Ex. 1).

34. Bert E. Arnlund (Arnlund) will serve as the full-time General Manager of the proposed station, devoting a minimum of 40 hours per week to station affairs. As General Manager, he will be involved in day-to-day decision making and direct the overall station operation. He will oversee all areas pertaining to the daily operation of the station, including the areas of programming and personnel, and will have final authority over all areas of station operation. He proposes to reduce his present involvement in Arnlund Auto Plaza, his auto dealership,[9] so that he can devote his full-time energies to the construction and operation of his new facility. Arnlund indicated that he intends to reduce his involvement with Arnlund Auto Plaza,[10] whether or not he is successful in this proceeding, and that David Pierce, General Sales Manager and Vice President of the Auto Plaza, is already "taking the reins" in running the company (Arnlund Ex. 2; Tr. 166-67, 169).

35. As noted, *supra*, Arnlund serves as Chairman and Chief Executive Officer of Arnlund Auto Plaza, located in Billings, Montana at 2540 Phyllis Lane. He has owned the business since its inception in 1972. He works at his Billings business six days a week, Monday through Saturday, throughout the year (Arnlund Ex. 1, p. 1; Tr. 131-32, 180).

36. As of the "B" cut-off date, Arnlund's application for the Billings station listed his residence as Silesia, Montana, and made no mention of residing in Billings or moving to Billings. When Arnlund filed his Integration Statement with the Presiding Judge, pursuant to the Presiding Judge's *Order Prior To Prehearing Conference* (FCC 83M-3886),

[9] Arnlund is owner, President and Chairman of the Board of Arnlund Auto Plaza.

[10] He indicated that his "target" for the amount of time he will spend at his car dealership, if he is the successful applicant, is 30 hours a week (Tr. 167).

released October 27, 1983, he did not indicate that he resided in, or proposed to reside in, Billings (Tr. 137). On March 30, 1984, the exchange date for hearing exhibits in this proceeding, Arnlund filed a "Petition For Leave To Amend" his application to report that he had established an "additional residence" at 1400 Poly Drive in Billings, some eight months earlier, in July 1983. In his "Petition For Leave To Amend," counsel for Arnlund stated that "Mr. Arnlund's legal residence for the purpose of voting always has been at Billings, Montana. He established this additional residence to assist his son, who is going to school in Billings since this is more convenient than the country home." The Presiding Judge, by *Memorandum Opinion and Order* (FCC 84M-1923), released April 20, 1984, accepted the amendment over objections by Northern Sun. However, the amendment was accepted solely for the purpose of compliance with Section 1.65, 47 C.F.R. 1.65. It was "specifically ruled that no comparative advantage" would accrue to Arnlund. Further, the Presiding Judge ruled that whether Arnlund's "legal residence" or "primary residence" is Billings or another community would be explored at the hearing and the record evidence would be determinative on the question.

37. Arnlund has lived in the Billings area since 1970. He moved to Silesia, which is 23 miles from Billings and is within the 1.0 mV/m contour of the proposed station, in 1976 (Tr. 126-28). He owns a ranch and raises horses there. He has characterized Silesia as his primary residence because his ranch and horses represent his "largest capital outlay" (Tr. 115). His driver's license lists Silesia as his residence, as do his personal federal and state income tax returns (Tr. 116). In annual corporate reports for his car dealership, including the most recent corporate report, filed January 27, 1984, Arnlund lists his address as being in Silesia (Northern Sun Ex. 4; Tr. 117, 121). And, in a recent financial proposal regarding a business investment in a Chevrolet dealership, Arnlund used his Silesia address[11] (Tr. 123).

38. Arnlund testified at a December 9, 1983 deposition that Silesia has been his primary residence for the past eight years and that he is now living "in town" (Billings) because his son started school in Billings in September 1983 (Tr. 128-30).

39. Arnlund explained that he lives at the ranch in Silesia on weekends from September to May or June and lives there all the time from May or

[11] Arnlund explained that the reason he has used a Silesia address on forms which he has filed is for convenience; he has owned the Silesia ranch continuously over the last decade, while during that same period he has resided at various rental properties in Billings (Tr. 115, 128).

June to early September.[12] However, he commutes from the ranch to his auto dealership in Billings six days a week (Tr. 128-32). He had lived in rental property in Billings from 1978 to 1983 during the September to May period, spending weekends on the ranch[13] (Tr. 112-21, 128-32). He purchased the property at 1400 Poly Drive in Billings in order that his stepson could attend school in Billings (Tr. 128-32).

40. Arnlund expressed the belief that Billings became his legal residence when he moved to Poly Drive in July 1983 (Tr. 112, 117). He is a registered voter in Billings. However, he is registered to vote in the district where his business is located, not at his Poly Drive residence, which is not listed in the Billings telephone book[14] (Tr. 126).

41. Arnlund has been active in the following organizations located in and/or directly impacting on Billings or the proposed service area:

Billings Chamber of Commerce.[15] In 1974-1975, Arnlund was a member of the Political Action Committee of the Chamber and has been a member since that time (Arnlund Ex. 1, p. 1). In late 1983, he became affiliated with another Chamber project, the Forward Billings Project, which is a $9 million development program to develop new business in Billings. He was contacted by a member of the Forward Billings Steering Committee and was requested both to contribute funds and to solicit funds from other automobile dealers (Tr. 139, 142-43). He spoke to "two main" people in January or February 1984 to solicit funds from them (Tr. 141-42).

Billings Elks Club. Arnlund has been a member, since 1975, of Billings Elks Club No. 394 (Arnlund Ex. 1, p. 2). His involvement has been in a yearly charity fundraiser. He bought one $50.00 ticket to a dinner and sold tickets to others (Tr. 144-45).

Billings Exchange Club. Arnlund is a member of the Billings Exchange Club, a group of businessmen who put on yearly fundraisers and dispense the money raised to local charities or civic groups (Tr. 147). While working in that Club from 1974 to 1981, Arnlund participated in a fundraising project designated to establish the public golf course for the City of Billings (Arnlund Ex. 1, pp. 1-2; Tr. 147-49). His involvement was to discuss the fundraiser and solicit funds at a monthly meeting of the 14-member Billings Auto Dealers Association (Tr. 148-49).

Northern International Livestock Exposition. Arnlund has been a member of the Northern International Livestock Exposition since it was founded by him and others

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[12] The time spent in Silesia depends on the weather; if it is nice, more time is spent there (Tr. 129-30).

[13] As noted, *supra*, Arnlund moved to his 1400 Poly Drive address in July 1983. Prior to that time, he lived on Arlene Street in Billings from 1981 to July 1983; at 507 Green Spring Drive in Billings from approximately 1979 until 1981; and on Lewis Avenue in Billings from 1977 to approximately 1979. Arnlund had rented his residences in Billings during that period (Tr. 114-15, 117, 128-29). Arnlund maintained that his move to 1400 Poly Drive in Billings in 1983 was unrelated to its effect on this proceeding (Tr. 131).

[14] He has an unlisted number for his Billings residence. His Silesia residence is in the phone book for that community (Tr. 127).

[15] Arnlund has never been an officer or director of the Chamber, nor has he headed a Chamber committee (Tr. 138). He is not presently an officer, director or chairman of any committee of any civic organization in the Billings area (Tr. 161-62).

eight years ago to promote the agricultural community. This organization is designed to promote the agricultural community within the Billings area by sponsoring various local functions, such as an agricultural exposition, a rodeo, a farmer-rancher appreciation day and an animal auction (Arnlund Ex. 1, p. 2). His involvement has been to make financial contributions, and his auto business sponsors exhibits and meetings for the Exposition (Tr. 152).

Yellowstone County Heart Fund Association. For the past eight years, Arnlund has been a sustaining member of the Yellowstone County Heart Fund Association (Arnlund Ex. 1, p. 2). A sustaining member is one who makes yearly financial contributions (Tr. 152). He raises money for the annual heart fund drive by selling tickets to a fundraising dinner (Tr. 152-53).

Albedoo Shrine. For the past four years, Arnlund has "involved himself" with the Albedoo Shrine, MaKena Brigade of Billings, which has raised money for the children's burn center (Arnlund Ex. 1, p. 2). He is not a member of the Shrine. His involvement has been in connection with the annual dinner for which he sold tickets (Tr. 154).

Yellowstone County Boys Ranch. Arnlund has contributed funds and the use of his dealership facilities to the Yellowstone County Boys Ranch (Arnlund Ex. 1, p. 2; Tr. 156-57).

Central Catholic Roundtable. For the past ten years, Arnlund has been "involved with" the Central Catholic Roundtable, an organization of businessmen which conducts fundraisers to purchase equipment for the Central Catholic High School (Arnlund Ex. 1, p. 3). His participation has involved buying tickets to fundraisers and selling tickets (Tr. 158).

Eastern Montana College Sting Club. As a "sponsor" for the club for the last two years, Arnlund has provided the club with the use of a car every year to assist the coaching and athletic staff of the College, which is located in Billings (Arnlund Ex. 1, p. 3; Tr. 159).

Billings Marine Corps Reserve "Toys For Tots." For the past five years, Arnlund has donated the use of his business facilities, provided a truck and donated toys for the Christmas drive (Arnlund Ex. 1, p. 3; Tr. 160).

Red Lodge, Montana, County Sheriff's Department. Arnlund assisted the Department, which is located within Arnlund's business service area, in their campaign in 1982 to acquire the necessary funds for placing markings on the Sheriff's automobiles. He contributed $2,000 in matching funds so that the cars could be properly marked (Arnlund Ex. 1, p. 3; Tr. 160-61).

42. Arnlund was appointed by the Governor of Montana to serve as a Director of the Federation of Rocky Mountain States from 1972 to 1974. This organization consists of six Rocky Mountain states, Wyoming, Utah, Montana, Colorado, Idaho and New Mexico. It is headed by the Governor of each state, a legislator from each state, and a member from the private sector, educational, business and legal. Each state has a board of seven members which meets separately, then jointly at an annual meeting. The organization was organized to pursue issues of public concern and improve living conditions in these states. Arnlund represented the interests of Billings while sitting on the Board. Meetings were held throughout the state, including Billings. Arnlund was also appointed for

two years (1973 and 1974) by the Governor of Montana to serve as a Director representing the public sector on the Montana State Salary Commission, which is a state government organization which makes recommendations to the legislature for salaries of all non-elected state officials, including officials in and around Billings, Montana (Arnlund Ex. 1, pp. 3-4; Tr. 162-65, 184).

43. As an automobile dealer and local businessman, Arnlund has been involved with local, state and national organizations concerned with problems affecting the auto industry in the states and communities represented therein. He was Vice President of the Billings Automobile Dealers Association in 1976 and 1977 and President in 1978 and 1979. He served as Chairman of the National Automobile Dealers AMC II 20 Group for 1981, 1982 and 1983. He is presently Chairman of the Montana AMC/Jeep Advertising Association, and has been a Director for the last three years of the Northwest Chrysler/Plymouth Dealers Advertising Association. He was recently elected the Dealer/Council Representative of the State of Montana in February 1984 and elected Vice Chairman of the Denver zone of the Dealer Council. He was a past Director of the National Dealer's Council for Mazda and past Chairman of the Northwest Mazda Dealer Council (Arnlund Ex. 1, pp. 4-5; Tr. 165-66).

44. Arnlund has no direct or indirect ownership interest in or connection with any medium of mass communication in Billings, Montana or anywhere else (Arnlund Ex. 2).

45. Both Arnlund and Northern Sun propose an auxiliary power supply to provide electrical power in the event of any failure of a regular power source (Arnlund Ex. 3; Northern Sun Ex. 3, p. 11).

(d) Comparative Coverage - Areas and Populations

46. The areas and populations to be served by each applicant's 1.0 mV/m contours are as follows (Joint Engineering Ex., Fig. 8):

	Northern Sun		*Billings Media*		*Arnlund*	
	Pop.	*Area*	*Pop.*	*Area*	*Pop.*	*Area*
Proposed 1.0 mV/m Contour	113,517	4,047	106,431	1,581	114,593	4,325
Common Area	106,330	1,565	106,330	1,565	106,330	1,565
Uncommon Area	7,187	2,482	101	16	8,263	2,760

47. During daytime hours, there are five or more primary aural services available within each of the applicant's uncommon service area (Joint Engineering Ex., p. 2). At night, however, proposed operations will provide the following levels of FM service to the indicated areas and populations within the uncommon area (Joint Engineering Ex., Fig. 8):

	Northern Sun		*Billings Media*		*Arnlund*	
	Pop.	*Area*	*Pop.*	*Area*	*Pop.*	*Area*
1st Aural Service	0	0	0	0	0	0
2nd Aural Service	0	0	66	9	242	117
3rd Aural Service	558	368	66	9	800	443
4th Aural Service	2,894	717	36	3	3,043	777
5th Aural Service	1,275	584	0	0	1,275	584

Ultimate Findings and Conclusions

1. This proceeding involves the mutually exclusive applications of Northern Sun Corporation (Northern Sun), Billings Media Company (Billings Media) and Bert E. Arnlund, d/b/a Arnlund Broadcasting (Arnlund), for authority to construct a new commercial FM station on Channel 279C (103.7 MHz) at Billings, Montana. The only qualifying issue requiring resolution raised the question of whether the engineering portion of the Billings Media application complies with the Commission's Rules. The record establishes that Billings Media has met this issue and it is found to be technically qualified to be a Commission licensee. The choice to be made among the three applicants is a comparative one and is addressed, *infra.*

2. The Commission has, over the years, emphasized that the two primary objectives to be accomplished in making a comparative choice are to obtain the best practicable service to the public and to achieve the maximum diffusion of control over the media of mass communications. Since none of the applicants has any cognizable ownership interest in any broadcast facilities or other communications media, the diversification factor is not, in any way, determinative in this proceeding.[16]

3. Turning to the effectuation of the "best practicable service to the public" objective, it is ruled that the three applicants are equal on quantitative integration, since each proposes 100% integration. William R. Reier, 100% owner of Northern Sun, proposes to serve as the full-time General Manager of the proposed station; James Stephen McClure, the sole proprietor of Billings Media, also proposes to be the full-time General Manager in the event of a grant; and, lastly, Bert E. Arnlund, the individual applicant, proposes full-time participation in the operation of the proposed station as General Manager. Northern Sun's contention that Arnlund has not established that he will be capable of effectuating his integration proposal because of his commitment to his auto dealership is rejected for the reasons set forth, *infra.* The Review Board has stressed

[16] Northern Sun is presently the licensee of Stations KBOZ(AM) and KBOZ-FM in Bozeman, Montana. However, Northern Sun had timely represented that it would divest itself of these broadcast facilities in the event it receives a grant for the FM station in Billings, Montana. The contention of Billings Media that Northern Sun must be given a "substantial comparative demerit" relative to the diversification factor is summarily rejected (Tr. 50-51).

that an applicant, in order to receive credit for integration of a principal with other time-consuming interests, must demonstrate a reasonable likelihood that its integration proposal will be effectuated. *See Blancett Broadcasting Co.*, 17 FCC 2d 227, 15 RR 2d 1349 (Rev. Bd. 1969); *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 586 (Rev. Bd. 1982), *recon. denied*, 92 FCC 2d 914 (Rev. Bd. 1982), *review denied*, FCC 83-415, released September 21, 1983.[17] The record establishes that Arnlund has set forth his integration proposal in detail and has allocated time to accommodate his activities in the automobile business while still effectuating his full-time proposal as General Manager. As detailed in the findings, Arnlund intends to reduce his involvement in his automobile dealership to 30 hours a week and has made arrangements for his General Sales Manager to run the automobile dealership. It is ruled that Arnlund is fully credited with 100% integration.

4. As noted, *supra*, the applicants are all equal as to the quantitative factor of integration and it is now appropriate to consider the qualitative enhancement factors of local residence, civic participation and the previous broadcast experience of the applicants. The findings detail that Arnlund has on prior occasions listed his residence as Silesia, Montana, and more recently has indicated that his residence is Billings. Northern Sun's contention that Arnlund should not receive qualitative enhancement credit for residence in the Billings community because this would result in "upgrading" is rejected. Arnlund has shown that he had residences in Billings prior to the filing of his application. Moreover, he has conducted his auto dealership in Billings for over twelve years and has worked at the dealership six days a week. His interest in his ranch in Silesia and his practice of spending as much time there as his schedule permits does not require the conclusion that he is not a *bona fide* Billings resident. It is ruled that Arnlund is to receive a comparative preference for his residence in Billings. However, both Reier and McClure have expressed their intention to move to Billings and, as a result, the preference to Arnlund is, at most, a moderate one. This is particularly the case as it relates to Reier, since he was formerly a resident of Billings until 1975.

5. The Review Board has recently stressed that credit for past or present civic participation is predicated on the view that such participation instills useful knowledge of the community's needs and interests by the integrated principal and that such involvement "betokens an interest in the welfare of the community." The focus of the Commission is on knowledge gained and interest shown in the problems and needs of the community. The Board has, for this reason, made clear that local residence is a separate enhancement factor from local involvement in the civic affairs of the community. *Radio Jonesboro, Inc.*, ___ FCC 2d ___,

[17] *See also Phoenix Media Corp.*, FCC 84R-57, released August 17, 1984, par. 12.

55 RR 2d 991 (Rev. Bd. 1984). In this case, McClure has no history of civic involvement in the community and, in fact, has never even visited Billings. He, therefore, stands a low third in this area of evaluation. Arnlund has been active in various organizations in Billings and continues active to date. Reier was extremely active in Billings community organizations while he lived there for the period 1967 to 1975. This past exemplary civic participation by Reier cannot be characterized as "antediluvian." *Radio Jonesboro, Inc., supra*, at 994. The Northern Sun application was filed in early May of 1982, and it is ruled that Reier's exemplary civic participation is not of such ancient vintage as to be given no consideration. On the contrary, Reier's awareness of community problems and needs of Billings is evidenced by his active participation in numerous civic organizations during the 1967-1975 period. The quality of Reier's civic activities, as detailed in the findings, exceeds that of Arnlund, whose activities were more in the nature of financial support than devotion of his own time and energies. Reier held several leadership positions in Billings community organizations and gave fully of his time and talents to these organizations. The Presiding Judge agrees with Northern Sun that Reier's Billings civic activities are "impressive" and that his contributions to the community deserve "significant consideration." Without denigrating Arnlund's activities, it is ruled that Reier's civic activities, though not of recent origin, surpass Arnlund's in both quality and quantity. It is concluded that Reier merits a moderate preference as it relates to civic participation.[18]

6. Neither Arnlund nor McClure has any broadcast experience. Reier, on the other hand, has 23 years of extensive and meaningful broadcast experience, having held management positions as Sales Manager, Program Director and General Manager. The Commission has indicated that this enhancement factor is of only "minor significance."[19] For this reason, it is ruled that Northern Sun is awarded a slight preference relative to broadcast experience. However, as the Review Board has indicated, "even slight qualitative differences loom large in the close case." *Radio Jonesboro, Inc., supra*, note 6.

7. A slight preference is awarded to Arnlund in light of the fact that its nighttime proposal[20] would provide a second aural service to 242 persons in contrast to the 66 persons to be served by Billings Media and the fact that Northern Sun would serve no gray area or population. Arnlund would also bring a third and fourth aural service to more persons

[18] McClure is a distant third as it relates to this comparative factor, as well as with respect to local residence.

[19] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, at 396 (1965).

[20] Each proposed service area presently receives five or more daytime primary aural services.

than would either of the other two proposals.[21] The Review Board has held that the provision of a first and second service is a matter of prime importance under the comparative coverage issue. *RAM Enterprises, et al.*, 57 FCC 2d 844, 853 (Rev. Bd. 1976). None of the proposals would bring a first service to any population and the disparity between the number of persons who would receive second or third nighttime service cannot be characterized as significant. For this reason, Arnlund is awarded a slight preference. *Radio Jonesboro, Inc., supra*, at 996.

8. A summary study of the applicants' comparative strengths and weaknesses makes clear that Billings Media, owned by James Stephen McClure, is a distant third in the comparative contest among the three applicants. The ultimate choice must be made between Northern Sun, owned by William R. Reier, and Arnlund Broadcasting, owned by Bert E. Arnlund. This is a close case.

9. Turning to the qualitative enhancement factors relative to integration of the principals into the day-to-day operation of the proposed station, it is noted that Arnlund earned a moderate preference for local residence, whereas Northern Sun was awarded a moderate preference for civic participation and broadcast experience. It is recognized that projecting the future participation of the principals of applicants in a broadcast station operation is somewhat problematical and speculative. However, the Commission, over the years, has found that the past is, in fact, a prologue to the future and that factors such as local residence and civic participation are indicative of an individual's sensitivity and awareness of the needs and problems of the community. While Arnlund's local residence is both extensive and contemporaneous and Reier's is not recent, Reier impressed the Presiding Judge with his sincere interest and intention to serve Billings with his own local broadcast outlet. He had, in the past, been General Manager of a Billings station in which he had no ownership interest. During this time, he had immersed himself in local civic and charitable organizations, devoting his time and talent to leadership roles in these entities. Reier has an impressive record of broadcast experience, and it is concluded that he could and would utilize this talent to operate a truly local broadcast outlet. Arnlund, on the other hand, is a local automobile dealer, with no broadcast experience, who would like to operate an FM station in his hometown. The Presiding Judge is persuaded that the public interest would be better served by granting the Northern

[21] Arnlund would bring a third and fourth aural service to 800 and 3,043 individuals, respectively, whereas Northern Sun would serve 558 and 2,894, respectively, and Billings Media would serve 66 and 36, respectively.

Sun proposal.[22]

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with Section 1.276(d) of the Rules, 47 C.F.R. 1.276(d),[23] the application of Northern Sun Corporation for a construction permit for a new FM station to be operated on Channel 279C at Billings, Montana IS GRANTED and the applications of Billings Media Company and Bert E. Arnlund, d/b/a Arnlund Broadcasting, ARE DENIED.

IT IS FURTHER ORDERED that grant of the application of Northern Sun Corporation IS SUBJECT to the condition that program tests WILL NOT BE AUTHORIZED until Northern Sun Corporation has divested itself of all interest in, and severed all connections with, Radio Stations KBOZ(AM) and KBOZ-FM, Bozeman, Montana.

FEDERAL COMMUNICATIONS COMMISSION

THOMAS B. FITZPATRICK, *Chief Administrative Law Judge*

[22] Both Northern Sun and Arnlund earned a slight preference for auxiliary power. The slight preference awarded Arnlund for comparative coverage does not tip the scales in his favor.

[23] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).

Broadcast Record, Past
Diversification
Ownership and Management, Integration of

Review Board reverses ALJ's grant of CP and awards it to competitor. The Board credited an integration commitment that became finalized before exchange of exhibits and took into account a managerial broadcast interest where applicant failed to make resignation commitment before 'B' cut off date. Winner prevailed on integration and past broadcast record factors.
—*Northland Communications*
MM Docket No. 85-961

FCC 85R-30

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Richard D. Stone and Clara Boahbedason d/b/a Northland Communications Atlanta, Michigan	MMDocket No. 83-961 File No. BPH-820415AO
Up North Broadcasting Company Atlanta, Michigan	MM Docket No. 83-962 File No. BPH-820211AL
For Construction Permit	

Appearances

Harry C. Martin and *Matthew H. McCormick*, on behalf of Northland Communications; and *Samuel Miller* and *Jerold Miller* on behalf of Up North Broadcasting Company.

DECISION

Adopted: March 29, 1985; Released: April 8, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. Northland Communications (Northland) and Up North Broadcasting Company (Up North) are the remaining competing applicants for authority to construct a new FM station on Channel 223C in Atlanta, Michigan. The sole remaining issue in this contest is the standard comparative issue. In an Initial Decision (I.D.), FCC 84D-73, released October 19, 1984, Administrative Law Judge Gonzalez (ALJ) awarded the construction permit to Up North after determining that a substantial participation preference earned by Up North exceeded a slight past broadcast record preference accorded Northland. This proceeding is now before the Review Board on exceptions to the I.D. filed by Northland and limited exceptions filed by Up North. The Board has reviewed the I.D. in light of the exceptions and reply briefs, the oral argument held February 22, 1985, and our examination of the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified in this Decision, but, for the reasons set forth below, we reverse certain of his conclusions and hold that a grant of Northland's application would better serve the public interest.

2. *Participation of Ownership and Management*. Northland is a general partnership consisting of two partners, both of whom propose to work full time at the station in managerial roles. Richard D. Stone, a 65% owner, will act as general manager and Clara Boahbedason, a 35% owner, will serve as business manager. I.D., paras. 6-7, 11. Up North, its opponent, is a corporation, proposing the participation one stockholder, Jerome L. Winder, in a full-time managerial function. Mr. Winder owns 57.1% of the applicant's voting stock and will serve as the station's general manager. *Id.*, paras. 17-20. In his I.D., the ALJ rejected Mr. Stone's participation commitment, reasoning that because it was finalized after the "B" cut-off date, accreditation of the proposal would constitute impermissible comparative upgrading, citing *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 55 RR 2d 627 (Rev. Bd. 1983). Having reduced Northland's claimed full-time quantitative participation from 100% to 35% by excluding Mr. Stone's commitment, the ALJ concluded that Up North was entitled to a substantial participation preference based on the clear quantitative difference between the two applicants, *i.e.*, 57.1% vs. 35%. He noted that both applicants were entitled to certain qualitative enhancements but observed that their qualitative attributes could not overcome the quantitative disparity. *Id.*, paras. 60-61.

3. Northland claims in its exceptions that it is entitled to credit for Mr. Stone's proposed full-time managerial participation at the station. We agree. It has long been Commission policy that applicants will not be allowed to amend their applications in a manner that will improve their

comparative positions after the cut-off date for amendments as of right, *i.e.*, the "B" cut-off date. *See Alexander S. Klein*, 86 FCC 2d 423, 434, 49 RR 2d 606, 615 (1981) and cases cited therein. This principle serves to avoid unfair prejudice to other competing applicants whose comparative positions were fixed as of that date and advances the need for administrative finality by requiring that applicants' comparative positions be fixed at some identifiable point. *Id.* Despite the general rule, however, the application form (FCC Form 301) has never been read to explicitly require applicants to set forth their full ownership participation proposals in their applications, *see Muncie Broadcasting Corp.*, 89 FCC 2d 123, 131, 51 RR 2d 46, 52-53 (Rev. Bd. 1982). Thus, although applicants filing under the old version of FCC Form 301 could — if they wished — still insert their proposals in their applications in response to Section IV-A, Item 27,[1] they have generally waited until the exchange of exhibits prior to hearing before revealing their complete integration proposals for the first time. *See e.g.*, *Radio Gaithersburg, Inc.*, 72 FCC 2d 835, 861-862 (ALJ), *aff'd* 72 FCC 2d 820, 45 RR 2d 1709 (Rev. Bd. 1979).

4. With this general background in mind, and in the specific context of the prior application form, the Board first addressed the issue of so-called "contingent integration proposals" in *High Sierra Broadcasting, Inc.*, *supra*. There, we held that were a proffered participation commitment was contingent upon a condition precedent and the condition precedent occurred after the close of the evidentiary record, the proposal could not be credited.[2] We ruled that "[a]cceptance of such a conditional and uncertain proposal would render the cut-off concept a nullity." 96 FCC 2d at 431, 55 RR 2d at 634. The issue arose a second time in *Metro Broadcasting, Inc.*, 57 RR 2d 440 (Rev. Bd. 1984), where we rejected a participation proposal for an Orlando, Florida station which was secondary to the principal's proposal to participate in a Sacramento, California application. The latter was dismissed only eleven days before the Orlando hearing and subsequent to the date fixed by the ALJ for submission of the parties' proposals. At the hearing the principal confirmed that she would have cancelled her Orlando commitment had the settlement in the other proceeding fallen through. *Id.*, at 450-51. Most recently, in *Northern Sun Corp.*, FCC 85R-23, released March 13, 1985, we held that an applicant's principal could not receive participation credit for a proposal in Billings,

[1] Item 27 requested the "name(s) and position of the person(s) who determines the day-to-day programming, makes decisions and directs the operation of the station. . . ." The revised version of the application form eliminates this item.

[2] Specifically, the applicant's proposal indicated that Chris Kidd, a 51% owner, would participate full time at the station "if the application [was] not granted until 1985, or if something unforeseen happen[ed] with his Placerville station." The evidentiary record was closed on July 20, 1982, and Kidd disposed of his interest in the Placerville station in September and October 1982. 96 FCC 2d at 432-432, 55 RR 2d 634-635.

Montana that was contingent upon that principal not receiving a grant in another proceeding where he also was proposed to participate. The application in the latter case was not dismissed until three months after the Billings hearing took place and the record was closed. *Id.*, at para. 3.

5. These three cases may fairly be read to stand for the proposition that applicants are not entitled to participation credit for proposals that are uncertain and indefinite on the date the proposals are required to be set forth. As indicated at para. 3, above, this has generally come to mean the exhibits exchange date. Although *High Sierra* contains language suggesting that the proper focus of inquiry concerning contingent proposals should be on the principal's intention as of the "B" cut-off date, this guideline was more pertinent to applications filed under the old version of FCC Form 301 where at least in theory participation proposals could often be determined from a review of the application. This rationale has less force, however, under the revised form which deletes all items under which an applicant's proposal could ostensibly be set forth. *See Revision of Form 301*, 50 RR 2d 381 (1981). Thus, unless the Commission otherwise requires applicants to specify the particulars of their ownership proposed participation at an earlier point, we will not consider a proposal as violative of the general prohibition against post "B" cut-off upgrading where it is definite and final on the exhibits exchange date — or earlier if specifically called for by the ALJ. In this latter regard, we have specifically approved the procedure employed in *Metro Broadcasting, Inc.*, *supra* at n.9, of requiring applicants to submit their complete proposals prior to the commencement of hearing, observing that such a procedure not only expedites matters but also encourages earlier settlements and lessens litigation.

6. The approach taken here is consistent with the objectives set forth in *Alexander S. Klein*, *supra*, since administrative finality will be furthered by fixing a firm date for the submission of definite plans, and no party will be prejudiced because all will be subject to observance of the same date. Nor should our discussion here be construed as a departure from current Commission policy or the general prohibition against post "B" cut-off date upgrading since the freeze on comparative positions as of that date in reality only pertains to that information that can readily be gleaned from an examination of the application. For example, an applicant still will not be able to claim participation credit for an individual who becomes a principal after the "B" cut-off date; nor can an applicant upgrade its quantitative credit when a participating principal's ownership percentage increases after the "B" cut-off date.

7. Applying the above principles to the facts of this proceeding, we discern no basis for rejecting Mr. Stone's proposal. Northland's application was filed on April 15, 1982. On September 15, 1982, the "B" cut-off

date, Northland filed an amendment stating: "Richard D. Stone intends to work full-time as General Manager in the event that [his application] for a new FM station in Defiance, Ohio is unsuccessful." Thereafter, on May 19, 1983 — four months before Northland's and Up North's applications were designated for hearing — Northland filed a second amendment, advising the Commission that Mr. Stone's application for the Defiance facility had been dismissed (on April 19, 1983) and that the dismissal would allow him to effectuate his participation pledge in this proceeding. Northland reaffirmed Mr. Stone's specific pledge in the parties' submissions of integration and diversification statements exchanged on December 6, 1983. Thus, it is clear that the proposal of Northland was certain and definite not only on the date both parties were required to set forth their proposals, but well before that date, unlike the circumstances in *High Sierra Broadcasting, Inc.*, *supra*, and progeny. The 65% quantitative participation removed by the ALJ from Northland's overall proposal will be restored.

8. The remaining exceptions under the participation criterion do not require extensive discussion. Up North urges that Northland is not entitled to any credit for Ms. Boahbedason's proposed participation since it has little managerial content. The exception will be denied. Ms. Boahbedason proposes to serve as the station's business manager, a position explicitly recognized as managerial by the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395, 5 RR 2d 1901, 1910 (1965); *see The Reginald A. Fessenden Educational Fund, Inc.*, FCC 85R-7, released January 30, 1985, para. 13. And her testimony reveals that she will have supervisory and managerial duties. On the other hand, Northland urges that Up North's quantitative participation credit should be diminished to 26.4% to reflect Jerome Winder's composite (*i.e.*, voting and non-voting) stock ownership in the applicant. This exception similarly will be denied. It is well settled that an applicant is entitled to the percentage of quantitative credit that accurately "reflects the extent of legal authority and voting powers [the participating owners] possess to implement station policy decisions," *see Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 510, 52 RR 2d 1210, 1213 (Rev. Bd. 1982), and here Mr. Winder owns 57.1% of the voting stock. We agree with the ALJ that Northland has not demonstrated that the limited powers over the corporation possessed by the Up North non-voting Class A stockholders diminish in any meaningful way the legal authority or power of the Class B voting stockholders to formulate and implement station policy. *See* I.D., para. 55. In summary, Northland clearly prevails on the participation criterion — 100% vs. 57.1% — entitling it to a moderate preference. *See Leflore-Dixie, Inc.*, FCC 85R-19, released

March 4, 1985, para. 8 (Rev. Bd.) (100% vs. 60% merits moderate preference).

9. *Diversification of Control of Mass Media.* The applicants were found on an equal footing under the diversification criterion by the ALJ. I.D., para. 59. Up North challenges this finding, arguing that Northland should be accorded a significant diversification demerit because of Mr. Stone's failure to make a commitment on or before the "B" cut-off date to relinquish his then-employment as vice-president and general manager of Stations WLVM and WMKC(FM), St. Ignace, Michigan. Mr. Stone is no longer associated with these stations. I.D. para. 9. We agree that Mr. Stone should have committed himself to leave his managerial positions at Stations WLVM and WMKC (FM) by the "B" cut-off date to avoid diversification consequences. In the circumstances of this case, however, where there was no ownership involved and where it was exceedingly unlikely, if not "inconceivable," as the ALJ termed it (I.D., para. 44), that Mr. Stone would remain at the competing St. Ignace facility (*i.e.* the 1mV/m contours of the proposed station and the existing St. Ignace FM station overlap), we believe only minimal impact on the Commission's diversification objective results and warrants at most a very slight diversification demerit. *Compare Rahu Broadcasting, Inc.*, 56 RR 2d 285 (Rev. Bd. 1984) *with The Reginald A. Fessenden Educational Fund, Inc.*, *supra* at paras. 6-7, and *Thomas C. and Essie L. Collins*, 93 FCC 2d 467, 468-469, 53 RR 2d 219, 221 (Rev. Bd. 1983).[3]

10. *Past Broadcast Record.* By Memorandum Opinion and Order, FCC 84M-046, released January 9, 1984, the ALJ found that Northland had met the requisite threshold showing to present evidence regarding the past broadcast record of Mr. Stone. I.D., para. 2. Although he found that the evidence of record demonstrated that Mr. Stone was unusually attentive to the needs and interests of the public in Oxford, Ohio while he was an owner and general manager of a station there, the ALJ ruled that full credit for Mr. Stone's superior broadcast record could not be accorded Northland because Mr. Stone did not propose a similar participation in the

[3] *See also San Joaquin TV Improvement Corp.*, 96 FCC 2d 594, 596,n.4, 54 RR 2d 1206, 1209 n.4 (Rev. Bd. 1983), where we recognized, for diversification purposes, media interests held on the "B" cut-off date. However, in *San Joaquin*, the interests recognized for comparative purposes were far more than a mere employment position. The interests there included directorships of a non-stock licensee — interests squarely equated with ownership, *see Roanoke Christian Broadcasting, Inc.*, 52 RR 2d 1725, 1727 (Rev. Bd. 1983), *rev. den.* FCC 83-441, released September 27, 1983, *aff'd by judgment sub nom. Western Virginia Television Co.*, v. *FCC*, case No. 84-455 (D.C. Cir. 1985). Moreover, one of the principals of the pertinent *San Joaquin* applicant was the Executive Director of the non-stock licensee holding two regional broadcast interests. 96 FCC 2d at 595, 54 RR 2d at 1208, 1209. Such substantial interests will be recognized unless a pre-cutoff pledge is announced, so as to prevent "upgrading." *Cf. Allied Broadcasting Co.* v. *FCC*, 435 F.2d 68, 70 n.9 (D.C. Cir. 1970).

operations of the Atlanta station I.D., para. 57. This conclusion was based on the ALJ's earlier finding that Mr. Stone could not receive credit because his claimed participation at the station was proposed after the "B" cut-off date (see para. 2 of this Decision). Northland seeks a substantial preference under this factor. In light of our holding in para. 7, above, reversing the ALJ's rejection of Mr. Stone's participation credit, Northland will receive a substantial past broadcast record preference. As set forth in the I.D., paras. 31-40, the station devoted a far greater percentage of its air time to news and public affairs than any other area FM station, donated substantial amounts of air time for special community service projects, and received letters of commendation and thanks from numerous local organizations. These factors warrant award of a significant preference. *See Big Bend Broadcasters*, 96 FCC 2d 166 (Rev. Bd. 1983), *rev. den.* FCC 84-645, released December 26, 1984.

11. *Final Comparison.* All decisionally significant exceptions have been considered. Northland is awarded a moderate preference for participation and a substantial preference for past broadcast record. A very slight diversification preference is awarded to Up North. The comparative balance clearly favors Northland, since the very slight diversification preference accorded Up North does not match the greater comparative preferences awarded Northland, and a grant of its application will better serve the public of Atlanta, Michigan.

12. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed January 17, 1985, by Northland Communications IS GRANTED, and the Amendment IS ACCEPTED; and

13. IT IS FURTHER ORDERED, That the application of Northland Communications (File No. BPH-820415A0) IS GRANTED; and the application of UP North Broadcasting Company (File No. BPH-820211AL) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 84D-73

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Richard D. Stone and Clara Boahbedason d/b/a Northland Communications Atlanta, Michigan	MM Docket No. 83-961 File No. BPH-820415AO
Up North Broadcasting Company Atlanta, Michigan	MM Docket No. 83-962 File No. BPH-820211AL
For Construction Permit	

Appearances

Robert L. Olender on behalf of Juarez Communications Corporation; *Michael J. Wilhelm* on behalf of Telecommunications Partners, Ltd.; *Harry C. Martin* and *Matthew H. McCormick* on behalf of Richard D. Stone and Clara Boahbedason d/b/a Northland Communications; *Mark E. Fields* on behalf of Up North Broadcasting Company; and *Norman Goldstein* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: October 16, 1984; Released: October 19, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Richard D. Stone and Clara Boahbedason d/b/a Northland Communications (Northland) and Up North Broadcasting Company (Up North) for a construction permit for a new FM station to operate on Channel 223C in Atlanta, Michigan.[1]

[1] The applications of Juarez Communications Corporation, Telecommunications Partners, Ltd. and Barr Broadcasting Corporation, formerly embraced within this proceeding, were dismissed with prejudice by Orders issued separately by the Presiding Judge on March 26, 1984 (FCC 84M-1501), February 2, 1984 (FCC 84M-589), and January 16, 1984 (FCC 84M-201), respectively.

2. The only issue outstanding and heard at the hearing was the standard comparative issue. In addition to the usual factors, the Hearing Designation Order, released on September 14, 1983 (Mimeo No. MM 6372), stated that the areas and populations to be served by the respective applicants should also be considered under the standard comparative issue. Additionally, on the basis of a threshold showing proffered by Northland, the Presiding Judge gave Northland permission to present evidence regarding the past broadcast record of Richard D. Stone, Northland's majority owner (Memorandum Opinion and Order, FCC 84M-046, released January 9, 1984).

3. The evidentiary hearing session was held on February 7, 1984. Proposed findings of fact and conclusions of law were filed by Northland and Up North on March 12, 1984, and each applicant filed a reply on April 3, 1984.

Preliminary Matter

4. Northland filed a "Motion to Strike" on April 5, 1984 in which it asks that the Presiding Judge strike Attachment A to Up North's "Reply of Up North Broadcasting Company to Proposed Findings of Fact and Conclusions of Law of Northland Communications" filed on April 3, 1984. Attachment A is an unsworn statement by David F. Tibbetts, who is identified as an Attorney and Counselor at Law. The request is opposed by Up North.

5. For good cause shown, the motion will be granted, and Attachment A stricken.

Findings of Fact

Northland Communications

6. Northland is a Michigan general partnership consisting of two partners, Richard D. Stone and Clara Boahbedason, whose percentages of ownership in the general partnership are 65 percent and 35 percent, respectively (Northland Ex. 1).

Richard D. Stone

7. Richard D. Stone will be general manager of the proposed station in Atlanta, Michigan and he will work a minimum of 40 hours a week at the station. As general manager, Mr. Stone will supervise the staff of the station and oversee its operations, while coordinating the station's promotional and public service campaigns, as well as public affairs programming with the needs and activities of the Atlanta community (Northland Ex. 2).

8. Since August 1981, Mr. Stone has been a resident of Petoskey, Michigan, a community which lies within the 1.0 mV/m contour of

Northland's proposed station (Tr. 26;* Northland Ex. 4). He has also been a regular seasonal visitor to the general area since 1947, usually spending a week or more each summer at Mullet Lake, which is approximately 38 miles from Atlanta and within the 1.0 mV/m contour of the proposed station (Northland Ex. 4). Mr. Stone will move to Atlanta in the event that Northland is the successful applicant (Northland Ex. 2).

9. Mr. Stone's broadcast experience began while a student at the University of Michigan. He served for two years as Chief Program Engineer for Station WCBN, the student radio station, with primary responsibility for engineering all football, basketball and hockey broadcasts. He also worked part time in a paid position as an engineer for the University of Michigan Television Center from 1967 to 1969. Mr. Stone's first commercial radio experience was with Stations WSPD (AM) and (FM), Toledo, Ohio where he worked full time during the summer of 1966 and part time during the summers of 1967 and 1968. In 1977, Mr. Stone and his wife purchased Station WOXY(FM), formerly WOXR(FM), Oxford, Ohio, and he served as the station's General Manager, Sales Manager and Chief Engineer until the station was sold in July 1981. In September 1981, Mr. Stone became General Manager of an existing AM Station, WLVM(AM), St. Ignace, Michigan, and a new FM Station, WMKC(FM) also in St. Ignace, both of which are licensed to Mighty-Mac Broadcasting Company. Mr. Stone's responsibilities during the first year of his employment with Mighty-Mac Broadcasting Company included the construction of the new FM station and the development of the AM station. Mr. Stone is no longer employed with Mighty-Mac Broadcasting Company (Northland Ex. 2; Tr. 24).

10. Mr. Stone has participated in the following civic activities in the Petoskey area:

> Member, Little Traverse Conservancy, Petoskey, October 1981 to present.
>
> Member, Crooked Tree Arts Council, Petoskey, December 1981 to present.
>
> Member, Petoskey/Harbor Springs Regional Chamber of Commerce, January 1982 to present.
>
> Member, Cheboygan Area Chamber of Commerce, October 1981 to present.
>
> Member, United Methodist Church, Petoskey, February 1982 to present. (Northland Ex. 2.)

In April 1982, Mr. Stone was honored by the Upper Peninsula Chapter of the March of Dimes for outstanding service (Northland Ex. 2).

Clara Boahbedason

11. Ms. Boahbedason is a native American Indian. She will serve as business manager of Northland's new station, devoting a minimum of 40

* All page references are to the transcript received by the Commission on February 15, 1984.

hours a week to the station's affairs. Her primary responsibility will be to oversee all the business activities of the station, including all bookkeeping and accounting matters. She will also supervise all office personnel involved in those activities, as well as those individuals performing traffic, secretarial and receptionist duties (Northland Ex. 3). She will also assist Mr. Stone with other activities at the station, such as the hiring and the firing of personnel (Tr. 19).

12. Ms. Boahbedason presently resides in St. Ignace, Michigan, approximately 66 miles northwest of Atlanta, but will move to Atlanta, Michigan in the event that Northland is the successful applicant (Northland Ex. 3).

13. Ms. Boahbedason has been employed by Mighty-Mac Broadcasting Company, licensee of Stations WLVM(AM) and WMKC(FM), St. Ignace, Michigan since June 1982. She was originally a part-time bookkeeper, but in September 1982 became the stations' full-time office manager. Ms. Boahbedason's duties at the stations included the responsibility for all accounts receivable bookkeeping, including monthly billing, cash collections, and ledger posting. In addition, she was responsible for traffic and logging for the AM station and the general management of the business office. She also supervised a part-time office clerk and coordinated station business activities with the sales and production staff and occasionally with clients (Northland Ex. 3).[2] Ms. Boahbedason is no longer employed with Mighty-Mac Broadcasting Company (Tr. 7).

Media Interests

14. Northland has no media interests.

15. Mr. Stone's sole ownership interest in any medium of mass communications is a 6.375 percent non-voting interest in Wolfe Communications, Inc., a permittee for a new FM station proposed for Defiance, Ohio (Tr. 25; Northland's Proposed Findings, pp. 7-8).[3] Ms. Boahbedason holds no media interests.

Integration

16. Northland claims a 100 percent quantitative integration credit for its proposal to integrate on a full-time basis Richard D. Stone and Clara Boahbedason into management positions at the proposed station. In addition, it contends that the 65 percent quantitative integration credit claimed for Mr. Stone is qualitatively enhanced by his residence since

[2] Northland will receive no credit for any broadcast experience acquired by Ms. Boahbedason after the so-called "B" cut-off date, September 15, 1982.

[3] According to the amendment filed on September 11, 1984 and received by Order, FCC 84M-4203, released September 28, 1984, Northland reports that as of the time the application for the Defiance, Ohio permit was granted, Mr. Stone held approximately a 3.5 non-voting interest in Wolfe Communications, Inc.

August 1981 in Petoskey, Michigan, which lies within the 1.0 mV/m contour of the proposed station and his participation in several civic and charitable activities in the Petoskey area. It claims a further enhancement of Mr. Stone's quantitative integration credit on the basis of Mr. Stone's intention to move to Atlanta in the event that Northland is the winning applicant, and his past broadcast experience which includes six years as general manager of a radio station. Northland claims a qualitative enhancement of Ms. Boahbedason's 35 percent quantitative integration credit on the grounds that Ms. Boahbedason is a native American female, with past broadcast experience, who has indicated that she will move to Atlanta in the event that the Atlanta license is awarded to Northland.

Up North Broadcasting Company

17. Up North is a Michigan corporation whose officers are Jerome L. Winder, President; E. Dan Stevens, Secretary/Treasurer; and Mitchell Kishigo, Vice President. The directors are Jerome L. Winder, Francis R. Hunter, Edward J. Hier, Mitchell Kishigo, Patricia J. Bolser, Richard Vogelheim and Ervin McMurphy (Up North Ex. 1).

18. Up North is authorized to issue 40,000 shares of Class A common stock and 29 shares of Class B common stock. As of the date of the hearing, 11,400 shares of Class A stock and 28 shares of Class B stock were held or had been subscribed. The following individuals have been issued or have subscribed to the indicated percentages of Class B stock:

	Residence	*Percentage of Class B Stock*
Jerome L. Winder	Battle Creek, Michigan	57.1
E. Dan Stevens	Atlanta, Michigan	3.6
Francis R. Hunter	Alpena, Michigan	3.6
Linda K. Huggler	Alpena, Michigan	3.6
Edward J. Hier	Alpena, Michigan	3.6
David W. Wilson	Kalkasa, Michigan	3.6
Mitchell Kishigo	Atlanta, Michigan	3.6
Terry D. Brooks	Cooks, Michigan	3.6
Patricia J. Bolser	Atlanta, Michigan	3.6
Richard Vogelheim	Rogers City, Michigan	3.6
Ervin McMurphy	Atlanta, Michigan	3.6
Terry Meeder	Elk Rapids, Michigan	3.6
Thomas R. Zick	Lewiston, Michigan	3.6

(Up North Ex. 1.)[4]

19. The Class B shares are entitled to one vote per share, the Class A shares have no voting rights except in the following instances:

a. Any sale or hypothecation of all or substantially all of the corporate assets.

[4] Amendment filed by Up North on April 2, 1984 and received by Order, FCC 84M-2014, released April 27, 1984.

b. Any use or action of the corporation which causes less than eighty (80%) percent of the cumulated retained earnings at the end of a fiscal year to be distributed as dividends to the shareholders, except that sums expended for retirement of corporate liabilities are exempt from the requirement of this subsection and shall be deducted from retained earnings in computing the retained earnings subject thereto.

(Excerpt from Amendments to Articles of Incorporation dated December 1, 1981, contained in Northland Ex. 9.)

Jerome L. Winder

20. Jerome L. Winder proposes to serve as Up North's general manager on a full-time basis, working a minimum of 40 hours a week. Mr. Winder will supervise the station's employees in all aspects of the station's operations, including programming, sales and expenditures as well as the technical performance of the station.

21. Mr. Winder resided in Rogers City, Michigan between 1968 and 1974, and in Alpena, Michigan between 1975 and 1982. Both communities lie within the proposed 1.0 mV/m contour of Up North's proposed station. Mr. Winder will move to Atlanta, Michigan in the event that the permit for the Atlanta station is awarded to Up North (Up North Ex. 2).

Broadcast Experience

22. Mr. Winder's broadcast experience dates from 1968 when he began working as a part-time announcer for a radio station in Festus, Missouri. After completing radio school in 1968, Mr. Winder became a full-time announcer and salesman at Station WHAK, Rogers City, Michigan, and in 1974, he became News Director at Station WPBN-TV, Traverse City, Michigan. He held the latter position until 1975 when he became Vice President and General Manager of Station WHSB, Alpena, Michigan. He left WHSB in 1982, and worked for TCI/Taft Cablevision in Michigan as Assistant Regional Manager until June 1983. He left this employment to accept a part-time position with Station WWKQ, Battle Creek, Michigan, and subsequently accepted a full-time position as morning host and staff announcer for Stations WKNR/WKFR, Battle Creek (Up North Ex. 2).

23. While employed at the Rogers City and Alpena stations, Mr. Winder was active in the civic affairs of these communities. He served as Vice President of the Little League Baseball league in Rogers City, and coached baseball for three years there. He also cooperated with the Rogers City Chamber of Commerce, assisting the Chamber on various fund raising projects, and was a member and a Board trustee of Calvary Bible Church in Rogers City. While living in Alpena, he was actively involved with the Alpena Little League Baseball Team as coach for three years, and was also a member of the Board of Directors of the Alpena Girls Club and a member of the Kiwanis Club. In addition, Mr. Winder served as a member of the long range planning commission of Alpena

Community College, and helped with the fund raising activities of the Muscular Dystrophy Association and the March of Dimes. He was also actively involved with the Alpena Civic Theater (Up North Ex. 2).

Media Interests

24. At the time the Up North application was filed on February 11, 1982, Mr. Winder was Vice President and General Manager, as well as a 17.3 percent stockholder of the licensee of Station WHSB, Alpena, Michigan. Mr. Winder resigned his positions with WHSB in 1982, but continues to hold a 10 percent stock interest in that station which he will sell upon grant of the Up North application (Up North Ex. 2).

25. The only other principal who has any present interest in any medium of mass communications is Mr. Vogelheim who is the owner of the only motion picture theater in Rogers City, Michigan (Tr. 72, 75).

Integration

26. Up North claims a 57.1 percent quantitative integration credit on the basis of its proposal to integrate Jerome Winder as general manager on a full-time basis. It also seeks an enhancement of that integration credit on the basis of Mr. Winder's past broadcast experience, his former residence in Alpena and Rogers City, both of which lie within the proposed service area, and his civic activities within these communities (Up North Ex. 1).

Comparative Coverage

27. Both Northland and Up North propose to mount their respective transmitting antennas on the tower presently used by Stations WCML-TV and WCML(FM). The tower is located nine miles north of Atlanta on Michigan State Highway 33. The geographic coordinates are north latitude 45 degrees, 8 minutes, 17 seconds, and west longitude 84 degrees, 9 minutes, 44 seconds. Both applicants propose to operate with an effective radiated power of 100 kilowatts. Northland proposes to operate with an antenna height of 861 feet above average terrain, and Up North with an antenna height of 961 feet above average terrain.

28. The following chart, based on Section V-B of each applicant's application, indicates the distance, rounded to the nearest mile, from the applicants' transmitter site to their respective 1.0 mV/m contours.

Radial Bearing Degrees	*Distance to 1.0 mV/m Contour (Miles)*	
	Northland	*Up North*
0	44	45
45	44	45
90	44	45
135	43	44
180	43	44

Radial Bearing Degrees	*Distance to 1.0 mV/m Contour (Miles)*	
	Northland	*Up North*
225	43	44
270	43	44
315	44	45

29. On the basis of these facts and figures, the parties have stipulated that no significant difference exists in the areas and populations to be served by each applicant (Joint Ex. 1; Tr. 3-5).

Past Broadcast Record of Richard Stone

30. As noted above, the Presiding Judge designated a superior broadcast issue in a Memorandum Opinion and Order released January 9, 1984 (FCC 84M-046). Northland which had both the burden of proceeding and the burden of proof was permitted to present evidence of the broadcast record of Richard Stone between December 1977 and July 1981 at Station WOXY(FM), formerly WOXR(FM), Oxford, Ohio, whose licensee at the time was Stone Broadcasting Company, Inc. During that time, Mr. Stone served both as President and General Manager of Station WOXY(FM), and Richard Stone, jointly with his wife, owned 55 of a total of 85 outstanding shares (64.8 percent) of Stone Broadcasting Company, Inc.

31. During Stone Broadcasting Company, Inc.'s ownership of WOXY(FM), and Mr. Stone's management of the station, WOXY(FM) carried the following public affairs program series:

(a) *The Park Place Breakfast Show* (Tuesdays, 9:05-9:35 a.m., August 1978 to December 1980) was a weekly public affairs program broadcast live from the Park Place Restaurant in downtown Oxford. Local and regional problems and issues were discussed with leaders from various organizations. Participation and questions by the audience were encouraged.

(b) *Talawanda Highlights* (Saturdays, 9:05-9:20 a.m., February 1979 to May 1981) was a weekly public affairs program carrying news and information about Talawanda High School. The program was produced by the school's senior speech class at the WOXY studios.

(c) *Insight* (Monday through Friday, February 1978 to April 1980) was a two-minute public affairs feature aired six times daily, with three different topics each day. The program featured in-depth analyses of local, state and national issues. All were locally written and produced by the WOXY news staff.

(d) *Speak Out* (Monday through Friday, February 1978 to July 1981) was a two-minute open line feature for listeners to voice their opinions. Calls were recorded for playback throughout the day. *Speak Out* segments were aired up to six times daily, depending on audience response.

(e) *Happenings* (Monday through Sunday, February 1978 to April 1980) was a two-minute listing of activities and events in the area, broadcast three times daily.

(f) *Behind the News* (Saturdays, 8:30-8:45 a.m., June 1978 to April 1979; 8:30-9:00 a.m., January 1981 to July 1981) featured analyses of the week's news and in-

depth reports on timely subjects. The program was written and produced by the WOXY news staff.

(Northland Ex. 5, pp. 4-7.)

32. Additionally, from February 1979 to July 1981, WOXY(FM) carried special weekly features saluting organizations in the community, and various members of these organizations were invited to the station to voice messages about their groups and activities. The 60-second messages were broadcast eight times daily. Among the participating organizations were the Oxford Senior Citizens, the Future Farmers of America, the Girl Scouts, Talawanda High School, Fairfield High School and the Oxford Ministerial Association (Northland Ex. 5, p. 7).

33. With respect to news programming, newscasts, at least five minutes in length, were carried each hour, 24 hours per day, and special ten-minute reports were broadcast at 7:00 a.m., 8:00 a.m., noon and 5:00 p.m. Additionally, nine farm reports were broadcast each weekday. A report was carried each Saturday featuring the Future Farmers of America and 4-H members from Talawanda High School. The station also carried business and stock market reports weekdays at 5:30 p.m. Additionally, editorials on local issues were written and presented by Richard D. Stone (Northland Ex. 5, pp. 8-9).

34. At various times during Stone Broadcasting Company, Inc.'s ownership of the station, WOXY donated substantial amounts of air time for special community service projects, for example:

(a) *Rotary Radio Days* (April 12, 1980, 9:00 a.m. - 6:00 p.m. (9 hours); April 4, 1981, 9:00 a.m. - 6:00 p.m. (9 hours)). On two occasions, WOXY Radio donated 9 hours of a broadcast day to the Oxford Rotary Club to use as a fund raiser for Oxford's Emergency Medical Services, the local school dental program, and the Neediest Kids Fund. Rotarians sold and aired commercials, with 100% of all funds going to the Rotary Community Service projects. In 1980, the Rotary Club raised $1,400.00, and in 1981, $1,780.00.

(b) *Heart Fund Auction* (April 1, 1978 (2 hours)). The auction was broadcast on WOXY to raise funds for the American Heart Association, in cooperation with the Sigma Alpha Mu fraternity at Miami University.

(c) *"Penny a Day for United Way"* (October 1979 and October 1980). WOXY organized and promoted heavily on the air a month-long campaign to involve the students of area schools in the United Way campaign. WOXY ran contests among the participating schools for the highest contributions from each school and homeroom. All funds collected went to the Oxford United Way Campaign. In 1979, $825.00 was raised; in 1980, $1,548.00 (Northland Ex. 5, pp. 3, 36, 39).

(d) *Civic Softball Smash* (August 12, 1979). A special celebrity softball tournament was organized and heavily promoted on the air by WOXY to raise funds for the Oxford Life Squad in memory of an Oxford fireman who had died. The tournament collected $358.58 (Northland Ex. 5, pp. 2, 38).

(e) *"Kash for Kids" Marathon Broadcast* (December 1980 (3 days)). WOXY suspended all regular programming for three days while two WOXY announcers

conducted a round-the-clock marathon to raise funds for needy children and their families for the Christmas season. Over $1,700.00 was collected and distributed through the Oxford Welfare Services, the Salvation Army, and the Talawanda School District (Northland Ex. 5, pp. 3, 40).

(f) *Halloween Safety Campaign* (October 15-31, 1978). WOXY, in cooperation with a local realtor, distributed reflective stickers to children for their trick-or-treat bags, and promoted Halloween safety through a PSA campaign for two weeks (Northland Ex. 5, pp. 3, 38).

(g) *Butler County Fair* (last week of July 1978, 1979, 1980). WOXY moved its broadcast operation each year to the Butler County Fair for a full week of continuous broadcasting. Programming included interviews with many people in the agriculture industry, plus representatives of the FFA, 4-H and other local groups (Northland Ex. 5, p. 3).

35. Other regularly scheduled non-entertainment programming aired by Station WOXY(FM) included the following:

(a) *Local Church Services* (Sundays, 9:00 a.m., 45 minutes, April 1978 to July 1981). During the fall, winter and spring, the Sunday worship service of the Oxford United Methodist Church was broadcast live. During the summer, the program originated live from the Oxford Presbyterian Church.

(b) *Showers of Blessing* (Sundays, 9:45 a.m., 15 minutes, April 1978 to August 1980). This religious program was produced by the Church of the Nazarene.

(c) *Spectrum* (Sundays, 8:00 a.m., 30 minutes, December 1977 to April 1980). This program, locally produced by a former WOXY staff member studying for the Roman Catholic priesthood, featured discussions of current events, issues and social concerns.

(d) *Scan* (Sundays, 7:30 a.m., 30 minutes, December 1977 to April 1980). The program was designed to appeal to young people and to cover the problems of youth. The program was produced as a joint venture of the American Lutheran Church and the United Methodist Church.

(e) *Powerline* (Sundays, 10:00 a.m., 30 minutes, December 1977 to July 1981). This youth-oriented program featured contemporary music with religious content, and was produced by the Southern Baptist Radio-TV Commission.

(Northland Ex. 5, p. 10.)

36. Station WOXY promoted its public affairs and other informational programming in newspaper advertisements (Northland Ex. 5, pp. 11-15).

37. Station WOXY received letters of commendation and thanks from numerous local organizations, including the following: The Oxford Chamber of Commerce, the United Way of Oxford, the League of Women Voters of Oxford, the Council on Ministries, the City of Oxford (regarding the Oxford Life Squad fund drive), the Talawanda School District, the Christian Student Fellowship, the Salvation Army, and the Miami University Student Foundation (Northland Ex. 5, pp. 16-23, 25-26, 28).

38. Station WOXY's 1979 composite week performance was compared with the following seven radio stations located within the Oxford, Ohio area: WPFB(AM), Middletown, Ohio; WJAI(FM), Eaton, Ohio; WPBY(FM),

WPBY(FM), Middletown, Ohio; WCNW(AM), Fairfield, Ohio; WLVV(FM), Fairfield, Ohio; WOKV(FM), Hamilton, Ohio and WLWS(FM), Hamilton, Ohio (Northland Ex. 7, pp. 1, 5-26). As noted above, Station WOXY is licensed to Oxford, Ohio, which is located in Butler County. All of the stations listed above, are licensed to communities in Butler County, with the exception of WJAI(FM) which is licensed to Eaton, Preble County, Ohio, which abuts Butler County. Middletown is located approximately 23 miles from Oxford; Eaton, approximately 16 miles; Fairfield, approximately 15 miles; and Hamilton, approximately 12 miles (Northland Ex. 7, p. 1).

39. The following tables compare WOXY's performance in terms of the amounts and the percentages of news and public affairs programming broadcast during the 1979 composite week, first with other FM stations in the Oxford area (Table 1), and then with AM and FM stations in the Oxford area (Table 2).

Table 1

News and Public Affairs Performance of Oxford Area FM Stations as Reflected in 1979 Renewal Application Composite Week

	News		*Public Affairs*	
	Minutes	*Percentage of Air Time*	*Minutes*	*Percentage of Air Time*
WOXY, Oxford	876	11.6	132	1.7
WJAI, Eaton	566	7.4	103	1.3
WPBF, Middletown	850	8.6	88	0.9
WLVV, Fairfield	339	3.4	75	0.7
WOKV, Hamilton	385	3.9	0	0.0
WLWS, Hamilton	450	4.5	120	1.2
Average	578	6.6	86	1.0

(Northland Ex. 7, p. 2.)

Table 2

News and Public Affairs Performance of Oxford Area AM and FM Stations as Reflected in 1979 Renewal Application Composite Week

	News		*Public Affairs*	
	Minutes	*Percentage of Air Time*	*Minutes*	*Percentage of Air Time*
WPFB(AM), Middletown	1234	12.5	408	4.1
WOXY(FM), Oxford	876	11.6	132	1.7
WJAI(FM), Eaton	566	7.4	103	1.3
WPBF(FM), Middletown	850	8.6	88	0.9
WCNW(AM), Fairfield	385	7.4	105	2.0

	News		*Public Affairs*	
	Minutes	*Percentage of Air Time*	*Minutes*	*Percentage of Air Time*
WLVV(FM), Fairfield	339	3.4	75	0.7
WOKV(FM), Hamilton	385	3.9	0	0
WLWS(FM), Hamilton	450	4.5	120	1.2
Average	636	7.4	129	1.5

(Northland Ex. 7, p. 3.)

40. On the basis of this showing, Northland claims a substantial comparative preference under the past broadcast record factor. Up North disputes this claim, arguing that Northland is not entitled to any preference under this issue, since it failed to present a witness or witnesses who were competent to testify as to the manner in which the representations made by each station in the composite week statements were prepared so that their reliability could be tested, or any witness that was competent to testify as to any other aspect of each station's operations which might bear upon each station's performance (Tr. 37). In response, Northland notes that each of the 1979 renewals presented by Northland includes (a) the licensee's acknowledgement that all of the statements in the application are considered "material representations" and (b) a certification that those statements "are true, complete and correct" and made in good faith; and that in any event, Up North did not call for the cross-examination of any party submitting these 1979 renewal applications, nor did it produce any rebuttal witnesses.

Conclusions of Law

41. All of the applicants have been found basically qualified. They must now be weighed in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The *Policy Statement* sets forth two major goals toward which the comparative process is to be directed: (a) the best possible service to the public; and (b) a maximum diffusion of control of the media of mass communications.

Diversification of Media Interests

42. With the exception of Richard Stone's 6.375 percent non-voting interest in Wolfe Communications, Inc., a permittee for a new FM station proposed for Defiance, Ohio, Northland has no chargeable media interests.

43. As of the so-called "B" cut-off date, Richard Stone and Clara Boahbedason were both employed by Mighty-Mac Broadcasting Company, the licensee of Stations WLVM(AM) and WMKC(FM), St. Ignace, Michigan. Northland's application is silent as to whether or not either individual intends to resign upon a grant of Northland's application. However, both

individuals testified at the hearing as to their intention to resign from their positions with Mighty-Mac Broadcasting Company in the event that Northland is the successful applicant.

44. Up North argues that the testimonies referred to above constitute an impermissible upgrading of Northland's application, since both Mr. Stone and Ms. Boahbedason failed to disclose such intentions on or before the so-called "B" cut-off date, and that Northland is, therefore, subject to a diversification demerit for these broadcast associations. The Presiding Judge finds no merit in this argument. There is no requirement that such a representation be set forth in the application. Furthermore, it is inconceivable that Mr. Stone and Ms. Boahbedason's former employer would permit them to remain in positions of responsibility with its stations which would be in direct competition with a station wholly owned by Mr. Stone and Ms. Boahbedason. In addition, the Presiding Judge notes that the Commission's cross-interest policy would prohibit Mr. Stone from remaining as General Manager and Vice President of these stations while being the licensee of the Atlanta station. *See, Lexington County Broadcasters, Inc.*, 42 FCC 2d 581 (Rev. Bd. 1973).

45. The Presiding Judge finds, therefore, that Northland's sole chargeable media interest or association is Mr. Stone's 6.375 percent non-voting interest in Wolfe Communications, Inc., the permittee of the new station in Defiance, Ohio.[5] The interest is found to be of no comparative significance under the diversification of media interests criterion in view of the small percentage of Mr. Stone's interest, the location of the station at a considerable distance from Atlanta, and by the additional fact that Mr. Stone's interest is a non-voting stock interest.

Up North

46. Up North has no media interests.

47. Jerome Winder, one of Up North's principals, presently holds a 10 percent stock interest in Station WHSB, Alpena, Michigan. However, it is of no decisional consequence, since he represented as of the "B" cut-off date, that he would sell this interest upon grant of Up North's application.

48. Richard Vogelheim, an Up North director and holder of 3.6 percent of Up North's Class B voting stock, is the sole proprietor of the only motion picture theater in Rogers City, Michigan, a community approximately 33 miles northeast of Atlanta, and which lies within the 1.0 mV/m contour of Up North's proposed station. Although the Commission has traditionally held that motion picture theaters are media of mass communications, *see, Southland Television Company,* 20 FCC 159

[5] By Order released on August 17, 1984 (FCC 84R-58), the Review Board granted the application of Wolfe Communications, Inc. for a new FM broadcast station at Defiance, Ohio.

(1955), theaters rarely serve as media for the exchange of ideas. *See, Peoples Broadcasting Corp.*, 52 RR 2d 1617 (Rev. Bd. 1983). Accordingly, in view of Mr. Vogelheim's small percentage of ownership interest in the applicant, and the limited role movie theaters play in the exchange of ideas, his ownership of the only theater in Rogers City is considered to be of no decisional significance, and for comparative purposes Up North is found to have no chargeable media interests.

Integration

49. Northland claims a 100 percent quantitative integration credit on the basis of its intention to integrate on a full-time basis Mr. Stone and Ms. Boahbedason into the affairs of the proposed station.

50. The case law prohibits an applicant from claiming credit for an integration proposal which is at variance with its application. *See, Commercial Radio Institute, Inc.*, 78 FCC 2d 1016 (Rev. Bd. 1980). Northland's amendment filed on the so-called "B" cut-off date advised the Commission that Mr. Stone would be integrated into the affairs of the station on a full-time basis in the event that Northwestern Ohio Communications' application (BC Docket No. 82-429, File No. BPH-810819AV) for a new FM station in Defiance, Ohio was unsuccessful.[6] Northwestern's application for the Defiance facility was dismissed with prejudice on April 19, 1983 (Memorandum Opinion and Order, FCC 83M-1301, released April 20, 1983).

51. Although the condition precedent occurred before the exchange of each party's integration proposal and direct testimony, the intention of Northland as of the "B" cut-off date, was that Mr. Stone would not be integrated into the affairs of the proposed Atlanta station unless the Defiance application was unsuccessful. Evidently, Mr. Stone at that time was primarily interested in his commitment to the Defiance, Ohio application, and as of the "B" cut-off date, it was not his intention to work at the proposed station. Although he is now, and at the time of the exchange of integration proposals and the direct testimony was in a position to make such a commitment and did so, Northland cannot after the "B" cut-off date improve its comparative position to the detriment of the competing applicant by seeking an integration credit for Mr. Stone merely because a subsequent event occurred which has made it possible for him to work full time at the station. As the Board noted in *High Sierra Broadcasting, Inc.*, 55 RR 2d 627 (Rev. Bd. 1983), "Acceptance of such a conditional and uncertain proposal would render the cut-off concept a nullity." Accordingly, the Presiding Judge finds that Northland is not

[6] The pertinent portion of the amendment reads as follows: "Richard D. Stone intends to work full time as General Manager in the event that the application of Northwestern Ohio Communications for a new FM station in Defiance, Ohio is unsuccessful.

entitled to a quantitative integration credit for its proposal to integrate Mr. Stone.

52. Northland's proposal also calls for the full-time integration of Ms. Boahbedason as station manager. Her duties at the station will be clearly managerial, and Northland is, therefore, entitled to a 35 percent quantitative integration credit for its intention to integrate Ms. Boahbedason.

53. Ms. Boahbedason's 35 percent quantitative integration credit is qualitatively enhanced by her status as a native American, and further enhanced by her sex, past broadcast experience, and by her decision to move to Atlanta in the event that Northland receives the construction permit.

54. Up North claims an integration credit of 57.1 percent for its proposal to integrate Mr. Winder on a full-time basis into the affairs of its proposed station. Mr. Winder will serve as the station's general manager, clearly a position of managerial and supervisory responsibility, which would entitle Up North to a full-time integration credit for Mr. Winder.

55. As noted above, Mr. Winder owns 57.1 percent of the Class B voting stock. Although Up North's non-voting Class A stockholders hold certain voting rights (*see* para. 19 *supra*), the Presiding Judge concludes that these rights do not diminish the legal authority and power of the Class B voting stockholders to formulate and implement station policy; and that Mr. Winder's 57.1 percent of the Class B voting stock will give him effective control over the every day affairs of the station as well as permit him to determine station policy. Up North is, therefore, entitled to an integration credit to the full amount claimed for Mr. Winder.

56. The quantitative integration credit awarded Up North is qualitatively enhanced by Mr. Winder's past broadcast experience and by his residence and involvement in the civic affairs of communities which lie within Up North's proposed service area. Winder's integration credit is further enhanced by his announced intention to move to Atlanta in the event that Up North is the successful applicant.

Past Broadcast Experience

57. The evidence of record, which the Presiding Judge finds probative, demonstrates that Mr. Stone was unusually attentive to the needs and interests of the public in the Oxford, Ohio area while owner and manager of Station WOXY, Oxford, Ohio. However, full credit cannot be given to Northland for Mr. Stone's superior broadcast record at Station WOXY, since Mr. Stone does not propose a similar participation in the operations of the proposed station. *See, Policy Statement, supra.* The Presiding Judge finds therefore that Northland is entitled to only a slight comparative preference for the past broadcast record of Mr. Stone at the Oxford, Ohio station.

Areas and Populations

58. The parties have stipulated that no significant difference exists between their coverage proposals. Accordingly, no comparative preference will accrue to either applicant.

Ultimate Findings

Diversification of Media Interests

59. Mr. Stone's 6.375 percent non-voting ownership interest in Wolfe Communications, Inc., an applicant for a new FM station in Defiance, Ohio, and Mr. Vogelheim's ownership of the only movie theater in Rogers City, Michigan, are considered *de minimis* and of no decisional significance. Accordingly, both applicants are on an equal footing under this criterion.

Best Practicable Service

60. The Presiding Judge concludes that Up North is entitled to a substantial preference for its integration proposal on the basis of the clear quantitative difference between Up North's integration proposal and that of Northland's. Furthermore, Up North's sole integrated principal controls the majority of Up North's voting stock, *i.e.*, 57.1 percent, and he will, therefore, clearly be in a position to formulate station policy and control the every day affairs of the proposed station. Whereas Ms. Boahbedason, Northland's sole integrated principal, is a minority stockholder with only 35 percent of Northland's stock. Although she will be integrated on a full-time basis in a position at the proposed station with managerial and supervisory responsibilities, control over the every day affairs of the station will rest with the majority stockholder Richard Stone.

61. Each integration proposal is entitled to certain qualitative enhancements. No decision will be reached as to the degree of that enhancement, since it is well established that mere qualitative attributes alone cannot overcome the clear quantitative difference that exists between the two applicants' integration proposals. *See, Radio Gaithersburg, Inc.*, 72 FCC 2d 820 (Rev. Bd. 1979).

62. The Presiding Judge finds, therefore, that the substantial integration preference awarded Up North far exceeds the slight comparative preference awarded Northland for the past broadcast record of Mr. Stone at Radio Station WOXY, Oxford, Ohio. Accordingly, the Presiding Judge concludes that Up North's proposal will best serve the public interest, and it will, therefore, receive the permit for the new FM station in Atlanta, Michigan.

Rulings

63. IT IS ORDERED that the Motion to Strike filed by Richard D. Stone and Clara Boahbedason d/b/a Northland Communications on April 5, 1984 IS GRANTED, and Attachment A to the "Reply of Up North Broadcasting Company to Proposed Findings of Fact and Conclusions of Law of Northland Communications" filed by Up North Broadcasting Company on April 3, 1984 IS STRICKEN.

64. AND IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Up North Broadcasting Company for a construction permit for a new FM station to operate on Channel 223C in Atlanta, Michigan (MM Docket No. 83-962, File No. BPH-820211AL) IS GRANTED; and the application of Richard D. Stone and Clara Boahbedason d/b/a Northland Communications (MM Docket No. 83-961, File No. BPH-820415AO) IS DENIED.[7]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH P. GONZALEZ, *Administrative Law Judge*

[7] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Reciprocal Service
Suburban Community 307(b) Issue

Reciprocal service doctrine repealed. Doctrine will no longer be available to permit full comparative consideration for an applicant proposing to serve a disfavored community under section 307(b). —*Public Service B/cing of West Jordan, Inc.*
BC Docket No. 82-366

FCC 85-105

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Public Service Broadcasting of West Jordan, Inc. West Jordan, Utah	BC Docket No. 82-366 File No. BPH-810819AJ
Walter P. Faber, Jr. Midvale, Utah	BC Docket No. 82-367 File No. BPH-810819BE
For Construction Permit for New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 1985; Released: March 8, 1985

BY THE COMMISSION: COMMISSIONER RIVERA CONCURRING IN THE RESULT.

1. This proceeding involves mutually exclusive applications, filed by Public Service Broadcasting of West Jordan, Inc. (Public) and by Walter P. Faber, Jr. (Faber) for authority to construct a new FM broadcast station at West Jordan and Midvale, Utah, respectively. In a Decision, FCC 84R-30, 97 FCC 2d 960, released 5/2/84, Review Board granted Faber's application. Now before the Commission are a Notice of Appeal, filed May 14, 1984, and an Application for Review, filed May 30, 1984, by Public, and a Reply, filed June 14, 1984, by Faber.

2. The Review Board, pursuant to Section 307(b) of the Act, resolved an issue to determine which of the proposals would best provide a fair and

efficient distribution of radio service, favorably to Faber. The Board further found, *inter alia,* that Public failed to establish a basis for waiver of the main studio location (Section 73.1125) and program origination (Section 73.1130) Rules, and that Public was not entitled to comparative consideration under the reciprocal service doctrine, as set forth in *Kent-Ravenna Broadcasting Co.,* 44 FCC 2603, 2067-08.[1] In its Application for Review, Public argues that the Board failed to consider the impact of the reciprocal service doctrine and the merits of the evidence supporting its waiver request.

3. In *Kaldor Communications, Inc.,* FCC 84R-26, released April 24, 1984, the Board reviewed the Commission's reciprocal service precedents, and based on the deficient attempts of various applicants to invoke the doctrine, concluded that the doctrine is lacking in true public interest substance. The Board stated that it would "henceforth decline to give any serious consideration" to the reciprocal service doctrine in Section 307(b) determinations, but noted that its holding was "subject to further Commission guidance." FCC 84R-26 *supra* at paras. 8-9. On March 2, 1984, before the release of the *Kaldor* decision, the Commission filed a brief in *WHW Enterprises, Inc.* v. *FCC,* No. 83-206, *et al.* (D.C. Cir.), in which it advised the Court that the reciprocal service doctrine would allow certain applicants for a disfavored community to have full comparative consideration with applicants designating a community favored pursuant to a Section 307(b) determination. In its Decision in this proceeding, the Board affirmed its holding in *Kaldor,* asserting that the *WHW* brief preceded the *Kaldor* decision and that the brief was reflective of case law up to that point. FCC 84R-30, *supra* at n.7.

4. The Commission's brief in the *WHW* proceeding contains an accurate statement of the reciprocal service doctrine. The doctrine has not been repealed.[2] We agree with the Board, however, that the doctrine is lacking "true public interest substance." Application of the doctrine is complicated and difficult. It is burdensome in adjudicatory proceedings without providing any offsetting benefits. Consideration of the doctrine tends to lengthen the hearing process thereby delaying the institution of new broadcast services. *See also Suburban Community Policy,* 93 FCC

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[1] In *Kent-Ravenna* the Commission held that an applicant for a less favored community under Section 307(b) is entitled to comparative consideration, if it provides primary coverage and complies with the studio location and program origination rules with respect to the favored community, or if it establishes a basis for a waiver of the rules. The Commission said that in the usual case applicants would not be in compliance with those rules and it would be necessary to request a waiver.

[2] Public has a right to rely on the continuing viability of the doctrine. Since the doctrine was developed by the Commission, the better procedure would have been for the Board to have certified or otherwise referred its concerns about the continuing viability of the doctrine to the Commission.

2d 436, 451 para 30. Accordingly, we find that the reciprocal service doctrine should be repealed, and it will be given no effect in future proceedings.

5. Since, the doctrine was still in effect during the earlier stages of this proceeding, we will consider whether Public is entitled to comparative consideration. Public has not complied with the studio location and program orientation rules for Midvale, nor has it established a basis for waiver of those requirements. The only evidence cited by Public in support of its waiver request is Public Exhibit 9. The exhibit establishes the geographical proximity of West Jordan and Midvale, and contains general statements that the main studio will be readily accessible to Midvale's residents and that it will provide programming responsive to Midvale's needs. Public Exhibit 9, however, does not set forth with particularity facts warranting a waiver of the rules. *Greater Media, Inc.*, 61 FCC 2d 692 (1976). Public has not demonstrated how far its main studio will be from Midvale[3] or shown that it will be readily accessible to Midvale residents by either major highways or public transportation. In addition, although Public's application lists numerous programs responsive to the needs of West Jordan, it has not shown the programs it proposes to broadcast which are responsive to the needs of Midvale. Thus, Public has not shown that it would provide service to Midvale beyond its obligation to broadcast programs responsive to the needs of its secondary service area. Under these circumstances, Public's request for a waiver of the studio location and program origination rules must be denied; and it is not entitled to comparative consideration under the reciprocal service doctrine.

6. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed May 30, 1984, by Public Service Broadcasting of West Jordan, Inc., IS GRANTED, to the extent indicated herein, and in all other respects IS DENIED; and that the grant of the application of Walter P. Faber, Jr. (File No. BPH-810819BE) for authority to construct a new FM broadcast station at Midvale, Utah IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[3] The Board properly denied Public's request for leave to specify an auxillary studio in Midvale. Public failed to show good cause for its post designation amendment. *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140 (Rev. Bd. 1970). The amendment is also deficient since it would constitute a post designation upgrading of Public's comparative position. *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 434 (1981). Finally, even if Public had established good cause, the amendment would not affect the outcome of this case because Public failed to show how it would serve the needs of Midvale.

Amicus Curiae
Broadcast Experience, see also comparative criteria
Civic participation, Effect of
Comparative Coverage Issue, see also coverage
Local Residence, see also comparative criteria
Minority Ownership, Factor in Comparative Proceeding

Applicant with 100% local residence, moderate credit for civic involvement and slight credit for broadcast experience awarded slight integration preference over applicant with 100% minority ownership and slight credit for civic involvement, where both applicants propose 100% integration. Slight coverage preference awarded to applicant that will bring new third and fourth nighttime service to 3616 people. NBMC allowed to file *amicus* brief.
—*Radio Jonesboro, Inc.*
BC Docket No. 82-641

FCC 85-74

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Radio Jonesboro, Inc. Jonesboro, Arkansas	BC Docket No. 82-641 File No. BPH-810603AG
MSB Communications Corporation Jonesboro, Arkansas	BC Docket No. 82-643 File No. BPH-811027AC
Whispering Sounds, Incorporated Jonesboro, Arkansas	BC Docket No. 82-645 File No. BPH-811028AL
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1985; Released: April 5, 1985

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT.

1. This proceeding involves three mutually exclusive applications for a new FM station in Jonesboro, Arkansas, filed by Radio Jonesboro, Inc. (Radio Jonesboro), MSB Communications Corporation (MSB Communications), and Whispering Sounds, Incorporated (Whispering Sounds). Radio Jonesboro is the licensee of standard broadcast Station KNEA in Jonesboro, and proposes no integration of ownership and management. Neither MSB Communications nor Whispering Sounds has any other media interests, and both propose 100% full time integration. MSB Communications is owned by J. Murl Smith and O.L. Bayless, both of whom reside within the proposed service area. Bayless will serve as the full-time station manager. Whispering Sounds' sole owner and proposed station manager is Ben McGee, a Black male. McGee resides in Marion, Arkansas but has been actively involved in the affairs of Arkansas State University which has a campus in Jonesboro. If Whispering Sounds' application is granted McGee will rent an apartment in Jonesboro, but his permanent residence will continue to be in Marion.

2. In a Decision (FCC 84-20, released March 21, 1984) the Review Board granted the application filed by MSB Communications and denied the competing applications filed by Radio Jonesboro and Whispering Sounds.[1] The Board concluded that the choice was between MSB Communications and Whispering Sounds since both were entitled to preferences over Radio Jonesboro under diversification and integration. It credited both MSB Communications and Whispering Sounds with 100% full time integration, but found that the qualitative enhancements of MSB Communications' integration proposal exceeded those of Whispering Sounds' proposal. In particular, the Board awarded MSB Communications substantial enhancement credit for 100% local residence, moderate enhancement credit for civic participation, and slight enhancement credit for previous broadcast experience. Whispering Sounds received substantial enhancement credit for 100% minority ownership and "some" enhancement credit for civic involvement. In preferring MSB Communications under the factor of integration, the Board relied upon our decision in *Waters Broadcasting Corp.*, 91 FCC 2d 1260 (1982), *aff'd*, *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *petition for cert. filed* Oct. 31, 1984 (No. 84-700). There we refused to differentiate

[1] *Radio Jonesboro, Inc.*, FCC 84R-20, 96 FCC 2d 1106 (Rev. Bd 1984).

qualitatively between enhancement credit awarded for local residence and for minority ownership. Accordingly, the Board concluded that MSB Communications' substantial credit for 100% local residence offsets Whispering Sounds' substantial credit for 100% minority ownership. The Board awarded MSB Communications a slight integration preference based upon its enhancement credits for civic involvement and previous broadcast experience. In addition, MSB Communications received a slight comparative coverage preference.

3. Now before us are: (a) an Application for Review of the Review Board's Decision, filed April 20, 1984, by Whispering Sounds, Incorporated;[2] (b) a Motion to Reopen the Record, filed June 11, 1984, by MSB Communications Corporation;[3] (c) Comments, filed May 21, 1984, by National Black Media Coalition; and (d) Motions to Strike, filed on May 23 and May 25, 1984, by Whispering Sounds, Incorporated and MSB Communications Corporation, respectively.[4]

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[2] MSB Communications Corporation filed an Opposition on May 3, 1984; Whispering Sounds, Incorporated filed a Reply on May 16, 1984; Radio Jonesboro, Inc., filed a Partial Reply on May 15, 1984; and National Black Media Coalition filed Comments on May 21, 1984.

[3] MSB Communications' Motion relates to the 100% interest that the wife of Whispering Sounds' sole owner acquired in the permittee of a new FM station in Marion, Arkansas. Whispering Sounds, Incorporated filed an Opposition on June 19, 1984. In view of our action herein, the Motion to Reopen the Record will be dismissed as moot.

[4] On May 29, 1984 the National Black Media Coalition filed an Opposition of MSB Communications Corporation's May 25, 1984 Motion to Strike. MSB Communications and Whispering Sounds move to strike Radio Jonesboro's May 15, 1984 Partial Reply to Opposition. In addition, MSB Communications moves to strike Whispering Sounds' May 16, 1984 Reply to Opposition, and the National Black Media Coalition's May 21, 1984 Comments. Section 1.115(f) of the Commission's Rules allows the filing of replies to oppositions only if requested by the Commission. Since the filing of such unsolicited replies is clearly prohibited, *Adjudicatory Reregulation*, 58 FCC 2d 865, 876 (1976), since the pleadings in question were not requested by the Commission, and since no compelling reason has been offered why the Reply, or the Partial Reply should be accepted, we are convinced that the Motion to Strike filed by Whispering Sounds should be granted and that the Motion to Strike filed by MSB Communications should be granted in part. We will deny that portion of MSB Communications' Motion which requests that Comments filed by National Black Media Coalition be dismissed. The National Black Media Coalition has requested that we permit it to participate in this proceeding as an *amicus curiae*. Since we believe that this proceeding raises significant questions of concern to Black broadcasters, we will permit National Media Coalition to participate as an *amicus curiae* and accept its Comments as an *amicus* brief. *See Waters Broadcasting Corporation*, 91 FCC 2d 1260, 1261 & n.2 (1982), and *Cowles Broadcasting, Inc.* 86 FCC 2d 993, 1018-19 (1981). In accepting the Comments as an *amicus* brief, we do not adopt the National Black Media Coalition's suggestion that its pleading be treated as a Reply. In our view, the Comments constitute a late filed brief which urges the Commission to grant review. If we found that the Comments constituted a Reply to MSB Communications' Opposition, we would not waive procedural rules designed to reduce unwarranted delay and accept as an

4. Having examined the contentions of the parties and of the National Black Media Coalition, we believe that MSB Communications is the comparatively superior applicant and that the grant of a construction permit to MSB Communications is fully justified. Accordingly, we will deny review and adopt the findings of the Review Board. However, in view of the importance of the questions raised herein, we believe that it is appropriate to give guidance to subordinate authorities for their consideration of similar cases in the future.

5. In its Application for Review Whispering Sounds urges that minority ownership has more significance as an enhancement factor than local residence under our decision in *Waters Broadcasting Corp.*, 91 FCC 2d 1260 (1982). Accordingly, it challenges the Board's determination that MSB Communications' substantial enhancement credit for 100% local residence offsets Whispering Sounds' credit for 100% minority ownership. In addition, Whispering Sounds claims that MSB Communications is not entitled to substantial enhancement credit for local residence since Mr. McGee also has important ties to the community of Jonesboro. Finally, it faults the Board for having ignored the positive impact which its 100% minority ownership will have on diversification of ownership.

6. Although this is a close case, we find that the Board correctly concluded that MSB Communications has the superior integration proposal. Both MSB Communications and Whispering Sounds propose 100% full time integration. With regard to qualitative enhancement factors, Whispering Sounds is 100% minority owned and MSB Communications is 100% locally owned. Notwithstanding Whispering Sound's contention, MSB Communications is entitled to substantial enhancement credit for 100% local residence. The award of substantial credit for this factor does not, as Whispering Sounds claims, resurrect the nexus requirement which we rejected in *Waters* or otherwise undermine our efforts to foster minority ownership. In *Waters* we indicated that credit for minority ownership is not dependent upon the presence of a minority population in the proposed service area. Nevertheless, we awarded substantial enhancement credit to the non minority applicant for 100% local residence. Thus, *Waters* does not stand for the proposition that local residence has no decisional significance in a case involving a minority applicant.[5]

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amicus brief a pleading which we would not accept if it were filed by a party to the proceeding.

[5] Whispering Sounds' further argument that MSB Communications is not entitled to substantial enhancement credit for local residence because McGee has important ties to Jonesboro mistakenly confuses the amount of credit due for 100% local residence with the weight to be given this factor in the final comparative evaluation. Furthermore, local residence and civic participation are separate criteria under the 1965 *Policy Statement*. Finally, we have never held that area familiarity is sufficient to overcome long term local residence.

7. We cannot agree with Whispering Sounds' contention that minority ownership has more significance as an enhancement factor than local residence under *Waters Broadcasting Corp.*[6] There we held that fostering minority ownership is "a fundamental policy goal of this Commission" and that "minority ownership policy is to be given full application and significant weight in comparative broadcast hearings." 91 FCC 2d at 1266. Accordingly, we found in that case that the Board had erred in concluding that substantial enhancement credit for local residence outweighed substantial enhancement credit for minority ownership. In reversing the Review Board in *Waters* we were not required to differentiate qualitatively between enhancement credit for minority ownership and local residence because the minority applicant resided within the proposed service area. Thus, the correct reading of *Waters* is that minority ownership is entitled to no less enhancement credit than local residence.

8. We will not expand our decision in *Waters* and hold that minority ownership has more comparative significance as an enhancement factor than local residence. In our view, minority ownership and local residence have equal significance in choosing the comparatively superior applicant. As we indicated in *Waters*, both local residence and minority ownership are fundamental considerations in our licensing scheme. Both policies complement our concern with diversification of control of broadcast ownership. Moreover, similar assumptions underlie both policies. We award enhancement credit for local residence because "[p]articipation in station affairs ... by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs."[7] It is expected that this increased knowledge of the community of license will be reflected in a station's programming.[8] Likewise, credit for minority ownership and participation is awarded in a comparative proceeding "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint."[9] Since both minority ownership and local residence can be expected to affect proposed programming it would be extremely difficult to choose between these equally laudable public interest considerations. Absent some record evidence for choosing between these worthy policies, we believe that it would be inappropriate to make a choice between them

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[6] 91 FCC 2d 1261 (1982), *affirmed sub nom. West Michigan Broadcasting Co. v. FCC*, 735 FCC 2d 601 (D.C. Cir. 1984).

[7] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965) (hereafter 1965 *Policy Statement*).

[8] See generally *Deregulation of Radio*, 84 FCC 2d 968, 993-1000 (1981).

[9] *TV 9, Inc. v. FCC*, 495 F. 2d 929, 938 (D.C. Cir 1973). *See also Waters, supra*, 91 FCC 2d at 1264, where we said "there is a critical underrepresentation of minorities in broadcast ownership, and full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership...."

without an opportunity for public comment. Consequently, we will continue to give substantial weight to both minority ownership and local residence in comparative proceedings.

9. Since local residence and minority ownership have equal significance, MSB Communications' enhancement credit for 100% local residence offsets Whispering Sounds' enhancement credit for 100% minority ownership. However, MSB Communications' remaining enhancement credits for civic participation and previous broadcast experience outweigh the single credit due Whispering Sounds for Ben McGee's involvement with Arkansas State University at Jonesboro. As the Board found, MSB Communications is entitled to a slight enhancement credit for the previous broadcast experience of O.L. Bayless. From December 1952 to March 1962 Bayless had a 10% ownership interest in Station KBHS, Hot Springs, Arkansas. In addition, he served as fulltime radio announcer at KBHS from June 1953 to June 1954. Since his position at KBHS involved managerial and ownership duties, MSB Communications is entitled to enhancement credit for Bayless' involvement with KBHS. We will not disregard Bayless' experience altogether because it was acquired more than 20 years ago. Neither the 1965 *Policy Statement* nor Commission precedent require that broadcast experience must be current in order to warrant any enhancement credit,[10] and we can find no basis for such a requirement. Credit for broadcast experience, unlike civic participation where our concern is awareness and probable responsiveness to community need,[11] is premised upon the recognition that a broadcast background will be helpful.[12] Although technological change may effect the specifics of broadcast operation over time, we do not believe that the benefit of previous broadcast experience is totally lost merely because of the passage of time. Thus, we affirm the award of a slight enhancement credit to MSB Communications for the broadcast experience of Bayless.[13]

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[10] *New Continental Broadcasting Co.*, 88 FCC 2d 830, 849-50 (Rev. Bd. 1981). *See also Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080, 1085 & n. 9 (Rev. Bd 1980), where the Board gave credit for broadcast experience of only 31 months in duration; *Lynn Mountain Broadcasting*, 9 FCC 2d 854 (Rev. Bd. 1967).

[11] 1965 *Policy Statement*, *supra*, 1 FCC 2d at 396; *Ventura Broadcasting Co.*, 95 FCC 2d 1023, 1029 & n. 22 (1983); *Lynn Mountain Broadcasting*, *supra*, 9 FCC 2d at 855-56.

[12] *New Continental Broadcasting Co.*, 88 FCC 2d at 849.

[13] We reject National Black Media Coalition's contention that Bayless' broadcast experience should be disregarded because it occurred at a time when discrimination made it virtually impossible for a minority group member to acquire any comparable experience. Although we are committed to encouraging greater participation by minorities in the ownership and management of broadcast facilities, our efforts in this area do not permit us to ignore other pertinent public interest considerations. *See Global Broadcast Group, Inc.*, 94 FCC 2d 809, 813, (1983), where we concluded that minority ownership has less significance than broadcast experience in an interim proceeding.

10. MSB Communications is also entitled to moderate enhancement credit for civic participation. Bayless, who has resided in Jonesboro since 1965, has been secretary of the Jonesboro Rotary Club since July 1982; a member of the local Rotary Scholarship Committee since July 1981; a member of the Jonesboro Fine Arts Council since 1980; a member of the Kiwanis Club from 1973 to 1974; and an active member of the Jonesboro Baptist Church since 1974. Smith, who has lived in or near Jonesboro since 1957, has been director of the Craig County Cancer Association since 1982; a member of the Jonesboro Rotary Club from 1974 to 1976; secretary of the Jonesboro Lions Club from 1967 to 1968; chairman of the Jonesboro March of Dimes in 1968; and an active member of the Central Baptist Church in Jonesboro. Although Ben McGee has never lived in Jonesboro, he nevertheless has been an active member of the Board of Trustees of Arkansas State University at Jonesboro and has been a member of the University's Foundation Board since 1982. As the Board correctly held, local residence is not a prerequisite for enhancement credit for civic participation. In this regard, credit is awarded because civic involvement indicates a knowledge and interest in the community to be served.[14] Thus, Whispering Sounds is entitled to enhancement credit for McGee's activities with Arkansas State University at Jonesboro.[15] Nevertheless, McGee's civic participation, which is confined to his involvement with the University, is not as extensive nor as varied as the long term involvement of MSB Communications' owners.[16] Thus, Whispering Sounds is entitled to only slight enhancement credit for civic participation.

11. Whispering Sounds' single enhancement credit for civic participation is insufficient to overcome MSB Communications' moderate enhancement credit for civic participation and slight enhancement credit for

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[14] The 1965 *Policy Statement* indicates that "[p]ast participation in civic affairs will be considered as a part of a participating owner's local residence background as will any other local activities indicating a *knowledge of and interest in the welfare of the Community.*" (Emphasis added). 1 FCC 2c at 396.

[15] Whispering Sounds is not entitled to any enhancement credit for McGee's civic activity in Marion, Arkansas, since these activities did not occur within the proposed service area. *1965 Policy Statement, supra*, 1 FCC 2d at 396. *Compare Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1963 & n. 10 (1982), where we awarded enhancement credit for Mrs. Waters' civic activities which were outside the community of license but within the proposed service area.

[16] *Absolutely Great Radio, Inc.*, 95 FCC 2d 1023, 1029-30 (1983). We must reject the contention that the Board gave too much credit to civic activities which occurred more than seven years before the application. There has been no withdrawal from civic participation which would warrant disregarding altogether these activities. *Veterans Broadcasting Co., Inc.*, 38 FCC 25, 61 (1965); *Ottumwa Broadcasting Company*, 92 FCC 2d 1011, 1016 (Rev. Bd 1978). The award of a moderate enhancement credit to MSB Communications for civic participation properly reflects that community concerns change and therefore these activities necessarily have less significance than more recent activities.

broadcast experience. The differences between the integration proposals of MSB Communications and Whispering Sounds are not great. Nevertheless, MSB Communications has a slight, but clear, advantage over Whispering Sounds under both civic participation and previous broadcast experience. While these factors have less significance than either minority ownership or local residence and while the disparity between the applicants on these factors is slight, it is nevertheless incumbent upon us to determine, based upon our standard comparative criteria, which applicant will better serve the public interest. In this regard, it is well established that in a comparative proceeding even "a slight difference may be decisive when greater differences do not exist."[17]

12. Whispering Sounds urges that the Review Board erred in not considering the positive impact which minority ownership has upon our diversification policy. However, Whispering Sounds is not entitled to any diversification credit for minority ownership under Commission precedent. In this regard, it is well established that in comparative proceedings credit for minority ownership is awarded only to the extent that minority owners will actively participate in the management of the proposed station,[18] and that no credit is awarded for minority ownership *per se*.[19] In comparative proceedings we evaluate many public interest factors in order to select the best qualified applicant and give credit for minority participation even when it is less than a controlling interest and even when the level of involvement is less than what would otherwise be required for integration credit.[20] Under these circumstances, we believe that it is appropriate to give credit for minority ownership and participation only in conjunction with the integration criterion. Integration of ownership and management has substantial importance under the 1965 *Policy Statement.* If we considered minority ownership under diversification this would detract significantly from our integration policy. By crediting only participating minority ownership we encourage maximum participation by minority group members in the management of broadcast stations and assure the best practicable service to the public.

13. MSB Communications proposes to bring new third and fourth nighttime services to 51,853 people or 3616 more people than Whispering

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[17] *Sacramento Broadcasters* v. *FCC*, 236 F. 2d 689, 693 (D.C. Cir 1956). *See also Birmingham Family TV Inc.*, 91 FCC 2d 348, 354 (Rev. Bd. 1982).

[18] *WPIX, Inc.*, 68 FCC 2d 411-12 (1978). *See also TV 9, Inc.* v. *FCC*, 495 F. 2d 929, 941 and n. 1 (Cir 1973), where the Court indicated that we were not required to award credit for minority ownership *per se.*

[19] *Las Misiones de Bejar Television Co.*, 93 FCC 2d 191 (Rev. Bd. 1983), *review denied*, FCC 84-97 (May 16, 1984), *appeal pending*, No. 84-1255 (D.C. Cir. June 18. 1984); *HLD & M Communications*, 93 FCC 2d 143, 145 (Rev. Bd. 1983).

[20] *Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 2146-47 (1978); *Peoples Broadcasting Corp.*. 92 FCC 2d 1303, 1327 (Rev. Bd. 1983).

Sounds would serve. As the Board found, this disparity warrants a slight coverage preference under Commission precedent.[21] Thus, under best practicable service MSB Communications has preferences for both integration and comparative coverage.[22] Therefore, the grant of its application will better serve the public interest.

14. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike, filed May 23, 1984, by Whispering Sounds, Incorporated IS GRANTED; that the Motion to Strike, filed May 25, 1984, by MSB Communications Corporation IS GRANTED in part and DENIED in part; that the Reply to Opposition to Application for Review, filed May 16, 1984, by Whispering Sounds, Incorporated, and the Partial Reply to Opposition to Application for Review, filed May 15, 1984, by Radio Jonesboro, Inc. ARE DISMISSED; and that the Comments, filed by May 21, 1984, by the National Black Media Coalition ARE ACCEPTED as an *amicus* brief.

15. IT IS FURTHER ORDERED, That the Application for Review, filed April 20, 1984, by Whispering Sounds, Incorporated IS DENIED; that the Decision of the Review Board (FCC 84R-20, released March 21, 1984) granting the application of MSB Communications Corporation (File No. BPH-811027AC) IS AFFIRMED; and that the Motion to Reopen the Record, filed June 11, 1984, by MSB Communications Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[21] *See CJL Broadcasting Inc.*, 88 FCC 2d 750, 758-59 (Rev. Bd. 1981), *reversed on other grounds*, 54 RR 2d 1037 (1983), where a slight preference was awarded for a proposal to bring a third aural service to 1786 more people, a fourth service to 315 more people, and a fifth service to 945 more people than its opponent would serve. *See also Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080 (Rev. Bd. 1980), where the Board affirmed an Initial Decision which awarded a slight preference for a proposal to bring new service to an area with only three daytime and two nighttime services; and *FBC Incorporated*, 95 FCC 2d 256, 259-61 (Rev. Bd. 1983), where a substantial preference was awarded for bringing first service to 2309 people, a second service to 355 people, a third service to 4556 people, a fourth service to 9592 people and a fifth service to 9727 people. *Compare Colorado West Broadcasting, Inc.*, 57 FCC 2d 526, 529 (Rev. Bd. 1976), where a decisive preference was not given for bringing first service to 617 persons.

[22] In light of this coverage preference, it is clear that MSB Communications would ultimately be preferred in this proceeding, even if the applicants were considered equal under the integration criterion.

DISSENTING STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Jonesboro, Arkansas Comparative FM Licensing Proceeding

In this case, the differences between the two leading applicants — MSB Communications (MSB) and Whispering Sounds (Whispering) — are insignificant. In these circumstances, the Commission should bear in mind the primacy of mass media diversification and the positive impact that a grant to the minority applicant would have upon that goal.[1] For this reason, although the contest in this case is close, I would have tipped the scales in Whispering's favor.[2] By unduly magnifying differences between MSB and Whispering, the majority has unfortunately lost sight of the primacy of the diversity goal, and thus, an ideal opportunity to enhance diversity in broadcasting.

The majority's decision essentially turns on the conclusion that MSB's credits for "civic participation and previous broadcast experience outweigh the single credit due Whispering Sounds for Ben McGee's involvement with Arkansas State University at Jonesboro."[3] MSB also was awarded a slight preference for superior signal coverage. The nominal advantages of MSB identified by the majority should not have been dispositive.

First, it is reasonable to conclude that based on their record of service to Jonesboro, MSB and Whispering can be expected to respond to local

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[1] As of October 1984, minorities owned under two percent of the more than 10,000 outstanding broadcast licenses and less than one-third of one percent of the over 15,000 CATV franchises. *See* Remarks of Congressman Mickey Leland, *Congressional Record*, Jan. 3, 1985, at p. E-41.

[2] The contenders in this case are somewhat similar to the contenders in *Waters Broadcasting*, 91 FCC 2d 1260 (1982), *aff'd sub nom West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3631 (March 4, 1985). Like the situation in *Waters*, we must choose between two highly meritorious applications. In *Waters*, we were faced with a choice between two groups whose principals both lived within the Hart, Michigan service area — one white owned, one black owned — and the grant was made to Nancy Waters, a black woman. The facts in this case are not precisely the same — one application is from long time residents of Jonesboro who are white, and one is from a black Arkansan with substantial ties to Jonesboro but who lives outside the proposed service area. Because of these factual distinctions, the majority's conclusion that *Waters* is not controlling (*see Jonesboro Memorandum Opinion and Order*, adopted Feb. 14, 1985, at paras. 7-8) is, strictly speaking, true. Nonetheless, for the reasons I set out in this statement, under the public interest rationale espoused in *Waters* and as a matter of policy, the FCC should have granted this new FM facility to Whispering.

[3] *Jonesboro Memorandum Opinion and Order*, *supra* note 2, at para. 9.

needs equally well.[4] By separately crediting MSB for local residence and civic participation, the majority unduly magnified the extent of the difference between the applicants.[5] It is true that MSB's local ties are of longer standing than Whispering's — its owners have resided in Jonesboro for approximately twenty years while Ben McGee, Whispering's owner, has resided 50 miles away in Marion.[6] However, McGee is certainly no stranger to Jonesboro, no absentee investor merely depositing his funds in the town to make a fast profit on a broadcast facility. Since 1976, McGee has been a member of the Board of Trustees of Arkansas State University at Jonesboro. Since 1982, he has served on the University's Foundation Board as a fundraiser.[7] These activities demonstrate a likelihood that McGee is not only familiar with Jonesboro's needs, but that he will be committed to meeting them in his broadcast operation.[8] Thus, while MSB's local ties are older, any resulting qualitative advantage is slight and should not win the day. In view of McGee's demonstrated, long term commitment to Jonesboro and the familiarity that commitment inevitably carries with it, the goal of community responsiveness can be equally well met by Whispering or MSB.

Second, the prior broadcast experience of O.L. Bayless, MSB's 50 percent owner, lacks any public interest benefit, contrary to my colleagues' finding. The Commission has always held that broadcast experi-

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[4] The Commission's rationale for granting comparative credit for local residence is that "participation in station affairs . . . by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs." *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). We recognize and credit civic involvement of local residents on the same theory. *Id.* ("Past participation in civic affairs will be considered. . . as well as any other local activities indicating a knowledge of an interest in the welfare of the community.")

[5] Both the Review Board and the Commission majority gave separate, distinct credit to MSB for the local residence and civic involvement of its owners. *See Radio Jonesboro, Inc.*, 55 RR 2d 991, 996 and n. 6; *Jonesboro Memorandum Opinion and Order*, *supra* note 2, at paras. 10-11. In the interest of analytic clarity, this approach seems reasonable. However, to the extent that this approach unduly magnified the scope of the real difference between the applicants on the issue of familiarity with local needs, this bifurcation was inappropriate. The question we must answer is which applicant has a superior ability to be responsive to Jonesboro's programming needs. Neither the Board nor the Commission majority was able to find that MSB had more than a small edge over Whispering in this regard. On the facts presented here, such a slight distinction should not have affected the outcome.

[6] *Radio Jonesboro, Inc.*, *supra* note 5, 55 RR 2d at 994.

[7] Id.

[8] Further, McGee stated his intentions not to be an absentee owner, but to work at the station fulltime as station manager, and to rent an apartment in Jonesboro itself. *See WSI Application for Review in Docket No. 82-641*, at p. 6 (filed April 20, 1984).

ence is only of minor significance, even when it is of superior caliber.[9] Bayless' experience in a station occurred some thirty years ago and was quite limited.[10] The broadcast business has changed significantly since the 1950s. Furthermore, experience acquired so long ago, whatever the nature, is of questionable relevance. In these circumstances, it was plainly wrong for the majority to have granted any credit to MSB for Bayless' prior experience.

MSB also received a slight comparative preference for providing third and fourth nighttime services to a total of 3,616 more persons than Whispering. However, because both applicants plan to serve underserved areas and populations at night and the difference in the amount of nighttime service proposed by the applicants to their respective underserved areas is *de minimis*,[11] neither applicant deserved a preference with respect to comparative coverage.[12]

Under either view — mine or my colleagues' — this is a close case. Obviously, the case is closer for me for the reasons I have just outlined. Where, as here, the Commission is faced with two applicants who are essentially in equipoise, established FCC policy favors selection of the applicant who would best diversify ownership and control of the mass media.[13] Therefore, although this case involves a close and difficult choice, this new FM facility should have been awarded to Whispering.[14]

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[9] 1965 *Comparative Policy Statement*, *supra* note 4, at 396 ("Since emphasis upon this element could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage, it will be deemed of minor significance").

[10] Mr. Bayless owned a 10 percent share in a radio station from 1952 to 1962. Between June 1953, and June 1954, Bayless acted as an announcer and sports director.

[11] Both broadcasters would be serving a large population, according to their proposals. MSB would be providing third services to 8,283 people and fourth services to 43,570 people. Whispering would be providing third services to 7,725 people and fourth services to 40,512 people. Given the importance of this case in helping to further the Commission goal of diversification, I see no reason why the provision of a third and fourth service to a few thousand more people should have any decisional significance when both groups intend to serve a large number to begin with and neither is providing first service.

[12] See *Preliminary Statement in Re Radio Jonesboro*, at p. 6 (released Nov. 3, 1983) (discussion of comparative coverage problem by ALJ).

[13] *Accord Waters Broadcasting*, *supra* note 2, 91 FCC 2d at 1266 ("minority ownership policy is to be given full application and significant weight in comparative broadcast hearings"); *cf. Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 2146-47 (1978) (minority ownership/participation the deciding factor in contest between two otherwise equal applicants).

[14] The majority's insistent adherence to the minority ownership policy outlined in *WPIX*, 68 FCC 2d 381 411-12 (1978), merits a brief comment. While the FCC's policy of awarding credit for minority ownership in comparative cases *only* in conjunction with integration of ownership and management (rather than under the diversification criterion) is "well established," *Jonesboro Memorandum Opinion and Order*, *supra* note 2, at para. 12, the reason for continuing the *WPIX* policy is not. The majority defends *WPIX* on the ground that requiring minorities to be integrated into management as a condition

precedent to receiving credit for minority status in comparative cases is needed to promote integration of minorities into management. However, this begs the question of why credit should be restricted in this fashion. After all, the FCC's pro-diversity policy, other than in the comparative process, focuses not on integration but on ownership, with particular emphasis on controlling ownership. *See generally Corporate Reporting and Disclosure by Licensees*, 55 RR 2d 1465, 1472 (1984) (" '[t]he significance of ownership . . . lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest' " (citation omitted)). In these other contexts, FCC policies rest on the view that "it is upon ownership that public policy places primary reliance with respect to diversification of content . . . " *TV 9, Inc.* v. *FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973). *See Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978) (distress sales); *Minority Ownership in Broadcasting*, 92 FCC 2d 849 (1982) (distress sales); *Competing Applicants Using Random Selection*, 93 FCC 2d 952 (1983); *Clear Channel AM Broadcasting*, 78 FCC 2d 1345 (1980), *recon. granted in part and denied in part*, 83 FCC 2d 16 (1980), *aff'd sub nom. Loyola University* v. *FCC*, 670 F.2d 122 (1982). As the Commission has recognized, a station's owners can and do influence its programming without having to be involved in daily management. Therefore, while promoting integration of minorities into management is an objective to which I subscribe, so is a policy which rewards minority ownership of broadcast facilities. Contrary to the majority's contention, adjusting comparative policy in this fashion would not detract from established integration policy because nothing would stop the Commission from continuing to award credit for integration of minorities into management, where their involvement has not otherwise been credited. *See Horne Industries, Inc.*, FCC 84-286, 98 FCC 2d 601 (released July 20, 1984) (Separate Statement of Commissioner Henry M. Rivera); *Las Misiones de Bejar Television, Co.*, FCC 84-97, ___ FCC 2d ___ (denying review) (released May 16, 1984) (Dissenting Statement of Commissioner Henry M. Rivera).

FM Station, Authorization
Transmission, First Local

Review Board affirmed *I.D.* grant based on dispositive Section 307(b) preference to applicant proposing first local transmission service to viable independent community of 2,050 persons. Losing applicant proposed to serve a nearby town of 22,940 people which already possessed local service.
—*Skipko Broadcasting, Inc.*
MM Docket No. 83-275

FCC 85R-21

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Skipko Broadcasting, Inc. Stevens Point, Wisconsin	MM Docket No. 83-275 File No. BPH-811201AK
Sharon Broadcasting Corporation Whiting, Wisconsin	MM Docket No. 83-276 File No. BPH-820122AR
For Construction Permit for a New FM Station	

Appearances

M. Scott Johnson, Esq. and *Kathy J. Bible, Esq.*, on behalf of Skipko Broadcasting, Inc.; *Samuel Miller, Esq.*, on behalf of Sharon Broadcasting Corporation.

DECISION

Adopted: March 1, 1985; Released March 8, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL

BOARD CHAIRMAN MARINO:

1. The two competing applicants in this case propose a new FM station in Wisconsin, in the communities of Stevens Point, and nearby Whiting. Stevens Point already has two stations; Whiting has none. After a trial-type hearing Administrative Law Judge Luton found that Sharon Broadcasting, the applicant for Whiting, is preferred because "Local transmission service bestows such important benefits that we have consistently interpreted Section 307(b) virtually to ensure an applicant for first local service preference over one who proposes merely to complement pre-existing local operations." *Pasadena Broadcasting Co.* v. *FCC*, 555 F.2d 1046, 1050-1 (D.C. Cir. 1977). *See* Initial Decision, FCC 84D-58, released August 23, 1984, para. 47. Based on the usual comparative factors, *I.D.* paras. 5-20, the ALJ also concluded that : "On balance," the applicant for Whiting also "receives a clear preference on the contingent comparative issue." *I.D.* para. 53. The unsuccessful applicant for Stevens Point, Skipko Broadcasting, has filed a brief and exceptions, but oral argument was not requested and was not deemed necessary by the Review Board in this traditional Section 307(b) case. We have reviewed the record in the light of Skipko's brief challenging the Initial Decision. In essence, we hold that the case was correctly decided under the many controlling Section 307(b) precedents recently discussed in *Caldwell Broadcasting Corp.*, FCC 85R-1, released January 15, 1985, *see also WHW Enterprises, Inc.* v. *FCC*, D.C. Cir. Nos. 83-2067; *et al.*, February 5, 1985, *slip. op.* 6.

2. On the Section 307(b) issue the ALJ made specific and concise findings about the nature of the Town of Stevens Point with a population of 22,940 (1980 Census), the Village of Whiting with a population of 2,050, I.D. paras. 22-38, and about the programming provided by the two existing stations to the greater Stevens Point area as well as Whiting. I.D. paras. 39-43. His findings also establish that the Whiting applicant is more efficient because it will provide service to 15,587 persons who presently receive only four other broadcast services whereas the Stevens Point applicant would provide such service to only 9,870 persons. I.D. paras. 44 and 53 (very slight preference for engineering efficiency).

3. Skipko advances four major arguments, some of which are inconsistent, and all which are lacking in merit. First, it argues that the Village of Whiting is not a community deserving of its own local transmission service, Br. 6-16. Second, it urges that even if Whiting is a deserving

community the existing stations in nearby Stevens Point serve as a surrogate transmission outlet for Whiting, Br. 19-24. Third, it states, *Huntington Broadcasting Co.* v. *FCC*, 192 F.2d 33 (D.C. Cir. 1951) mandates that the two applicants be considered as proposals for the larger central city and that the best comparative applicant should be selected. Br. 16. Fourth, it contends, if the community of Whiting is preferred the ALJ erred in refusing to add a reciprocal service issue allowing the Skipko applicant to be considered on a comparative basis with the applicant for Whiting. Br. 41-42.

4. First, Skipko struggles to make the Village of Whiting disappear as a community, but the findings establish that the 1980 census found that Whiting contained more than 2000 persons. I.D. para. 33-38. As the ALJ noted: "Whiting is a viable independent community with governmental and civic organizations customarily found in communities of its size." I.D. para. 50. Because it has no broadcast facilities of its own, I.D. para. 38, it certainly qualifies as a community of "appreciable size" which in the past has been awarded its own local transmission facilities. *Cf. Ruarch Associates*, 56 RR 2d 1593, 1594 (Rev. Bd. 1984). In past cases similar communities have been granted their own "first" and "second" local outlets. *See, e.g., Beaufort County Broadcasting Co.*, 94 FCC 2d 572 (Rev. Bd. 1983), *rev. denied*, FCC 84-284, released June 19, 1984; *Click Broadcasting Co.*, 43 FCC 203 (Rev. Bd. 1973); *Cherokee Broadcasting Co.*, 11 FCC 2d 857, 867 (Rev. Bd. 1968).

5. Second, our conclusion is reinforced by the ALJ's findings, and Skipko's second argument which establish that Whiting has its own unique and independent needs. Some of those needs are served by the existing stations which naturally concentrate their primary attention on the much larger community of Stevens Point. They do provide some service to Whiting, but on this record a satisfactory showing has not been made that the existing stations act as "surrogate transmission outlets" for Whiting, *see Cornwall Broadcasting Corp.*, 89 FCC 2d 704 (Rev. Bd. 1982). We affirm the ALJ's conclusion that: "There is no evidence that Whiting does not need a first local outlet and Skipko's arguments to the contrary are rejected." I.D. para. 50.

6. Third, reliance on the *Huntington* case, *supra*, is misplaced for the reasons fully set out in *Caldwell Broadcasting Corp.*, *supra*. *See also Beaufort County*, *supra*. Fourth, the last gasp invocation of the reciprocal service doctrine furnishes another sorry illustration of Section 307(b) gamesmanship at work in the comparative process. For the reasons fully articulated in *Kaldor Communications, Inc.* 56 RR 2d 137, 141-142 (Rev. Bd. 1984), *Public Service Broadcasting of West Jordan, Inc.*, 97 FCC 960, 962-63 (Rev. Bd. 1984), and *Caldwell Broadcasting Corp.*, *supra*, we affirm the ALJ's denial, *see Memorandum Opinion and*

Order, FCC 83M-1981, released September 1, 1983, and note that among other faults the Skipko application does not provide the required signal strength over all of the community of Whiting. *See* Sharon Reply p. 7.

7. In light of our conclusions, we need not reach the ALJ's analysis under the standard comparative issue or Skipko's exceptions thereto. Skipko's additional arguments about the real party in interest and site issues (Br. 30-40) are rejected for the reasons set out by the ALJ. *See Memorandum Opinions and Orders*, FCC 84M-2180, released May 8, 1984; FCC 83M-2085, released June 27, 1983; *see also High Sierra Broadcasting, Inc.*, 55 RR 2d 627, 631 (Rev. Bd. 1984). Sharon's limited exceptions, which in essence seek additional Section 307(b) findings, are moot.

8. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend, filed November 19, 1984 by Skipko Broadcasting Inc., IS GRANTED, and the amendment IS ACCEPTED; and

9. IT IS FURTHER ORDERED, That the application of Skipko Broadcasting, Inc., IS DENIED and the application of Sharon Broadcasting Corp. (File No. BPH-820122AR) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 84D-58

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Skipko Broadcasting, Inc. Stevens Point, Wisconsin	MM Docket No. 83-275 File No. BPH-811201AK
Sharon Broadcasting Corporation Whiting, Wisconsin	MM Docket No. 83-276 File No. BPH-820122AR
For Construction Permit for a New FM Station	

Appearances

M. Scott Johnson, Esq. and *Kathy J. Bible, Esq.*, on behalf of Skipko Broadcasting, Inc.; *Samuel Miller, Esq.*, on behalf of Sharon Broadcasting Corporation; and *Stephen T. Yelverton, Esq.*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: August 17, 1984; Released: August 23, 1984

Preliminary Statement

1. This proceeding involves mutually exclusive applications of Skipko Broadcasting, Inc. ("Skipko"), Central Wisconsin Broadcasting Company ("CWBC") and Highlands Broadcasting Company, Inc. ("Highlands") for a new FM radio station on Channel 244 at Stevens Point, Wisconsin and the application of Sharon Broadcasting Corporation ("Sharon") for a new FM station on Channel 244 at Whiting, Wisconsin.

2. The *Hearing Designation Order* set the following issues for hearing:

> 1. To determine the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations.

2. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. By *Order* FCC 83M-2981, released November 7, 1983, the Presiding Judge added the following issue:

5. To determine the extent to which the programming of existing stations meets the local needs of Whiting, Wisconsin, and to determine in light of the evidence adduced thereunder which of the applicants should be preferred.

4. The CWBC and Highlands applications have been dismissed, leaving Skipko and Sharon as the competing applicants. Hearings were held in Washington, D.C., on November 8 and 9, 1983 and the record in this proceeding was closed on February 10, 1984.

Findings of Fact

A. Skipko Broadcasting, Inc.

5. Skipko is a Wisconsin corporation having two shareholders. Ronald R. Kotas is president, treasurer, director and 50 percent shareholder of the corporation. Chester S. Skippy is vice-president, secretary, director and 50 percent shareholder of the corporation (Skipko Ex. 1).

6. Neither Mr. Kotas nor Mr. Skippy owns any interest in any medium of mass communications. Both of Skipko's shareholders will be integrated full-time into the management of the station. Mr. Skippy will serve as the sales manager and the financial controller of the station (Tr. 129, Skipko Ex. 3). He will work at least 40 hours per week at these duties.

7. As the sales manager, Mr. Skippy will be responsible for developing and maintaining a sales effort for the station. He expects initially to be supervising two salespeople (Tr. 130, 136). As the financial controller, he will be setting up budgets and overseeing station accounts. Mr. Skippy will supervise a bookkeeper and a clerk and will review all station financial transactions (Tr. 135).

8. Mr. Skippy is the owner of a general contracting and development business and has been in the business for approximately 25 years. His other business interests include the ownership of a bowling alley and a number of rental properties (Tr. 129, 128).

9. Mr. Skippy presently lives in Plover, Wisconsin. He lived in the Village of Whiting, Wisconsin, for 16 years before recently moving to Plover (Tr. 127). If Skipko is awarded a construction permit, Mr. Skippy will move permanently to Stevens Point (Tr. 131, Skipko Ex. 3).

10. Ronald R. Kotas is proposed as the full-time general manager and chief engineer of the proposed station (Tr. 154, 161, Skipko Ex. 2). He will work at least 40 hours per week in these positions. As the general manager, he will oversee the day-to-day station operations, and will set station policies. He will also be responsible for the station's equal opportunity program and participate in programming decisions.

11. Mr. Kotas presently lives in the Township of Carson, Wisconsin, within the 3.16 mV/m contour of Skipko's proposed station. His former residence in Milladore, Wisconsin was also within the 3.16 mV/m contour. Mr. Kotas will move to Stevens Point, Wisconsin if Skipko is awarded a construction permit (Tr. 153, Skipko Ex. 2).

12. Mr. Kotas is a member of the Army National Guard in Stevens Point (Tr. 157). He attends St. Paul's United Methodist Church in Stevens Point, and his children attend Stevens Point schools (Skipko Ex. 2). Mr. Kotas is the chairman of the 2713 Restoration Committee of Stevens Point, a group of area citizens who received permission from the Stevens Point Common Council to restore an old Soo Line steam engine located in Stevens Point (Skipko Ex. 2, Tr. 159). Finally, for the past one and one-half years, Mr. Kotas has served as a member of the Wisconsin Non-Ionizing Radiation Protection Council, which deals with danger to life and the environment from non-ionizing radiation sources (Tr. 159).

B. Sharon Broadcasting Corporation

13. Sharon's principals are Frederick B. Nienow and Sharon A. Nienow, husband and wife, each of whom is an officer, director, and 50 percent owner (Sharon Exs. 1 and 4). The Nienows presently reside in Wisconsin Rapids, Wisconsin, within Sharon's proposed 1 mV/m contour.

14. Mr. Nienow is proposed as the general manager of Sharon's station. He will oversee the entire operation of the station and, along with Mrs. Nienow, will establish the policies by which the station will function. Sales of commercial time will be a part of his day-to-day duties (Sharon Ex. 3).

15. Sharon Broadcasting Corporation now performs contracting engineering work for area radio stations through an entity called Broadcast Electronics Service, in connection with which Mr. Nienow performs some part-time work. From 1977 to 1978, he worked for WTCH/WTCH/FM, Shawano, Wisconsin, as sales person/chief operator. Thereafter, he worked for a time as chief operator of station KRCH. Mr. Nienow is now employed by WFHR/WWRW in Wisconsin Rapids, Wisconsin as chief operator (Tr. 353). Prior to commencement of the operation of Sharon's station, Mr. Nienow will terminate his present employment.

16. Mr. Nienow is an usher in his church. In 1981, he was vice-president of the St. Paul's Parent/Teacher Association and became its president the following year.

17. Mrs. Nienow proposes to work full-time at Sharon's proposed station as the office manager/program director (Sharon Ex. 4). As such, she will be in charge of all office procedures (bookkeeping, trafficking and billing) and, along with Mr. Nienow, will determine all the programming and day-to-day policies of the station.

18. Mrs. Nienow is a licensed cosmetologist and has worked at this occupation from time to time since 1968. In July 1977, she was employed as a salesperson at Northwest Fabrics in Marshfield, Wisconsin, and became an assistant manager there. In August 1981, Mrs. Nienow accepted a position with a fabric store in Wisconsin Rapids as assistant manager/salesperson. In March 1982, she began her hobby business, creating and selling arts and crafts items out of her home (Tr. 244). She last held a full-time job in December of 1981 (Tr. 246).

19. Since September 1981, Mrs. Nienow has been active in the Girl Pioneer Program at St. Paul's Lutheran School, Wisconsin Rapids, Wisconsin, acting as a leader of the third grade girls (Tr. 247). In May 1983, Mrs. Nienow chaired the Library Committee at St. Paul's Lutheran School to form a centralized library for the school. At the present time, she is enrolled in a typing and business refresher course at Mid-state Technical College. She has no connection with any medium of mass communications.

20. If Sharon's application is granted, the Nienows will move to Whiting or to the immediate area and each of them will devote full time (at least 40 hours per week) to the operation of the station (Sharon Exs. 3 and 4, Tr. 248).

21. Sharon proposes an auxiliary power generator (Sharon Ex. 5).

C. 307(b) Issue

The City of Stevens Point, Wisconsin

22. The City of Stevens Point is located in Portage County, Wisconsin. According to the 1980 U.S. Census, Stevens Point had a 1980 population of 22,940.

23. Stevens Point is the county seat of government for Portage County. All county government offices are located there (Tr. 166). The city is run by a mayor-council form of government. There are thirteen (13) aldermen elected by the constituents in their respective wards.

24. The City of Stevens Point provides fire and police services to its residents. The Stevens Point police department employs thirty-nine (39) officers and nine civilians. Portage County has one first-class post office with two sub-stations located in Stevens Point. Stevens Point has twenty-

nine fraternal, twenty-two professional, twenty health/welfare, twenty-three recreational, twenty-two religious and twenty-nine service organizations. These organizations include the American Cancer Society, American Legion, Stevens Point Masonic Temple, and Big Brothers-Big Sisters, Inc., among others. There are seven Catholic churches, four Lutheran churches, one Methodist, one Presbyterian, one Pentacostal church and one Church of Christ in Stevens Point (Skipko Ex. 4).

25. Stevens Point is served by the Stevens Point Area Public Schools. The district consists of nine elementary schools, two junior high schools, and one senior high school. The 1981-2 school district enrollment was approximately 7,200 students (Tr. 169). The only high schools in the area are in Stevens Point.

26. A branch of The University of Wisconsin is located in Stevens Point with a total enrollment of 8,954 pupils per semester. The Mid-State Technical Institute offers eleven (11) associate degree programs at the campus in Stevens Point (Tr. 231). There are 1,175 students enrolled there (Skipko Ex. 4).

27. Stevens Point is home to a paper mill, various furniture manufacturing firms, a major wholesale grocery distributor and other smaller industries. It is also the home of the World Headquarters of Sentry Insurance Company, which employs 2,015 people (Skipko Ex. 4). Other employers located in Stevens Point are I.G.A. Stores - Grocers, employing 2,200 people, the Soo Line Railroad which employs 320 people, Joerns Furniture employing 320 people, and Herrschener Needle Craft, employing 225 people.

28. There are fourteen parks located in Stevens Point. Stevens Point has hosted the Special Olympics several times, the most recent time being about two years ago (Tr. 172). The Charles M. White Library, located in Stevens Point, has a collection of over 122,000 volumes. It serves all of Portage County with its mail box library collection whereby patrons can order books by mail and send them back by mail (Tr. 173).

29. The city has its own symphony orchestra, the Central Wisconsin Symphony Orchestra of Stevens Point, which performs on a regular year-round schedule. There is a local art gallery, the Edna Calsten Gallery, located on The University of Wisconsin campus at Stevens Point (Skipko Ex. 4; Tr. 175).

30. Two airports serve the Stevens Point area: 1) the Central Wisconsin Airport, about 25 minutes from the city, and 2) the Stevens Point Airport, about 5 minutes from downtown (Tr. 176).

31. St. Michaels Hospital, a fully accredited general hospital, is located in Stevens Point. The hospital is staffed with 56 physicians and dentists and has a total number of 81 beds (Skipko Ex. 4). Additionally, Stevens Point offers its residents four medical clinics, a family crisis intervention

service and The Mid-Western Pyschotherapy Association. Approximately 53 physicians have offices in Stevens Point. Approximately a dozen social service organizations, such as the American Red Cross, Children's Service Society, Mental Health Association, and United Way, provide medical and mental health services to local residents. (Skipko Ex. 4).

32. There is one local newspaper in Stevens Point, *The Stevens Point Journal*, with a circulation of approximately 13,800 persons. This paper is published six days per week (Tr. 180). Stevens Point has two local commercial radio stations, WXYQ-AM and WSPT-FM. Their studios are within the city limits of Stevens Point (Tr. 89).

The Village of Whiting, Wisconsin

33. The Village of Whiting, Wisconsin, shares a boundary with the City of Stevens Point, Wisconsin. The population of Whiting, according to the 1980 U.S. Census, was 2,050 persons (Skipko Ex. 5).

34. Whiting is governed by an elected Board of Trustees. Other village officials or departments are clerk/treasurer; assessor/building inspectors; water department, fire department, and the park and street department. Clubs and other service organizations in Whiting include a 4-H Club, a Lions Club, health centers and credit unions. An elementary school, under the jurisdiction of the Stevens Point Area Public School District, is located in Whiting. A Seventh Day Adventist church is located there. Major industries in Whiting are Consolidated Papers, Inc. (Wisconsin River Division), Kimberly-Clark Corporation, the Worth Company, and the River Pines Community Health Center (Skipko Ex. 5).

35. The Village of Whiting has no separate Post Office of its own; it shares the Stevens Point zip code. All postal services are provided through the Stevens Point Post Office (Skipko Ex. 5). Law enforcement coverage and emergency police services are provided by the county. At the request of the Village, maintenance of its streets is provided by the County Highway Department (Skipko Ex. 5). The Stevens Point, Wisconsin transit system serves the Village of Whiting (Tr. 177).

36. Whiting has its own municipal water supply. However, because of excessive nitrates in recent years, that water is not potable. The Village has entered into a contract with the City of Stevens Point for the furnishing of water to users in the Village (Skipko Ex. 5).

37. Whiting has no separate school system, but is served by the Stevens Point Area Public Schools (Tr. 186). Whiting has no local high school. Its students attend a public high school and Catholic high school in Stevens Point (Tr. 77, 82; Skipko Ex. 5). Whiting has no local hospital; its residents use a hospital in Stevens Point, Wisconsin (Skipko Exs. 4 & 5).

38. There are no broadcast facilities presently licensed to Whiting; it has no local newspaper (Skipko Ex. 5).

D. Existing Programming

39. Stevens Point and the surrounding area, including The Village of Whiting, are served by two local commercial radio stations, WXYQ(AM) and WSPT(FM). These stations provide primary coverage to Whiting (Joint Ex. I). Mr. James Schuh, General Manager of Stations WSPT and WXYQ, testified that WSPT and WXYQ run newscasts every hour. More than 50 percent of these newscasts are of local news (Tr. 40). The stations' staff concentrates on local area news, including news of Whiting. Skipko Ex. 7 shows copies of some newscasts broadcast on WSPT and WXYQ specifically relating to the community of Whiting. This exhibit is said not to contain a complete listing of the news stories regarding Whiting that have been carried by the stations (Tr. 31). Some examples of the news coverage have to do with the acquisition of new fire trucks for Whiting, widening of the Post Road in Whiting, the placement of a new bridge over McDill Pond in Whiting, Whiting water well contamination, negotiations between Whiting and the Consolidated Paper plant located there over easements, and crime and accident reports for Whiting (Skipko Ex. 6). In 1982, two news stories were broadcast regarding labor negotiations between labor unions and a plant in Whiting (Skipko Ex. 7). A number of news stories were broadcast by WSPT and WXYQ regarding a sewer plan for the Stevens Point area, including Whiting.

40. WSPT and WXYQ report on activities of the Whiting Village Board. These topics are culled from the Village agendas that are mailed to the stations prior to specific meetings (Tr. 33). If the news department judges some agenda item to be of note, a reporter is sent to the meeting. If not, a reporter calls the Village Clerk the next day for the results of the meeting (Tr. 97; Skipko Ex. 6).

41. The stations regularly report deaths and births in Whiting as well as those in Stevens Point (Tr. 89-90). They also report national, state and local elections. Pre-election events and campaigns for seats on the Whiting Village Board are also reported (Tr. 60; Skipko Ex. 6).

42. The WXYQ public affairs program entitled "Topic" is broadcast three times a week. WSPT presents a weekly public affairs call-in program entitled "Sunday Forum;" each of these programs deals with the needs and concerns of the Stevens Point area including Whiting.

43. The two Stevens Point radio stations are licensed to Stevens Point and maintain their studios there. Mr. Schuh acknowledged that Stevens Point has the first call on the stations obligations as a licensee (Tr. 48-51). Items pertaining to Whiting are included in broadcast matter because of a recognition of the licensee's obligation to provide a program service for the entire service areas. Mr. Schuh testified: "We are stations that serve the greater Stevens Point area," (Skipko Ex. 6, p. 4) the "news staff

concentrates on news of the immediate area, including the Village of Whiting." (Skipko Ex. 6, p. 2).

E. Areas and Populations Issue

44. Within their respective 1 mV/m contours, Skipko's proposed station would serve 57,324 persons in an area of 611 square miles; while Sharon's proposed station would serve 71,095 persons in an area of 644 square miles. During the daytime, all the uncommon areas proposed to be served by each of the applicants receives five or more primary aural services (Joint Ex. 1, Fig. 4). During the nighttime, the number of available primary services within the uncommon areas ranges from four to five or more. Sharon will provide a fifth nighttime service to 15,587 persons in an area of 152 square miles, as compared to Skipko which will provide a fifth nighttime service to 9,870 persons in an area of 93 square miles.

Conclusions of Law

Section 307(b) and Programming Issue

45. Under Section 307(b) of the Communications Act, the Commission must "make such distribution of licenses, frequencies, hours of operation and power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." In this regard, the Commission's priorities, as set out *In Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1982), are the following:

(1) First full-time aural service, (*i.e.*, service to "white areas");

(2) Second full-time aural service, (*i.e.*, service to "gray areas");

(3) First local service; and

(4) Other public interest matters.

46. Neither applicant will provide either a first or second full-time aural service to any portion of the proposed service area. The area served by both receive a number of services. Neither applicant is entitled to a preference under priority (1) or (2).

47. Sharon argues that Priority (3) requires the conclusion that Whiting is the community preferred under Section 307(b) because it has no local transmission service, whereas Stevens Point already has two existing local outlets. It relies on *Pasadena Broadcasting Co.* v. *FCC*, 555 2d 1046, (D.C. Cir. 1977), in which the Court of Appeals stated: "Local transmission service bestows such important benefits that we have consistently interpreted Section 307(b) virtually to ensure an applicant for first local service preference over one who proposes merely to complement pre-existing local operations."

48. For its part, Skipko presents several arguments to why its application for Stevens Point should be preferred under Section 307(b). It argues that Whiting's needs are being met by stations WSPT and WXYQ which, although licensed to and located in Stevens Point, constitute "surrogate transmission outlets" for Whiting, thus placing Whiting on an equal footing with Stevens Point under the transmission criterion; Stevens Point's position as the County Seat of Portage County; its vastly larger population (ten times that of Whiting), and Whiting's dependence on Stevens Point for the provision of certain basic services, all suggest to Skipko that Whiting is "not deserving of its own local broadcast service." Skipko states its conclusion this way: "The differences in population and relative importance in the County and the area between Stevens Point and the Village of Whiting are so great that Stevens Point has a greater need for a second fulltime service and a third aural service than [Whiting] does for its first local service."

49. Stations WSPT and WXYQ serve the "greater Stevens Point area." The stations present matter having to do with Whiting undoubtedly in recognition of the obligation to provide a program service for their entire service areas. In carrying out that obligation, the stations present news of several communities geographically close to Stevens Point which, in addition to Whiting, are the Village of Plover, the Township of Plover, Hull, Lindwood, and Carson. No evidence indicates that the treatment given Whiting by the two Stevens Point stations is special in any way as compared with the treatment given other communities in the service areas. That the stations, having a primary obligation to the City of Stevens Point, nevertheless program matter that is of interest to the entire service area, including Whiting, hardly constitutes those stations "surrogate transmission outlets" for Whiting.

50. Skipko would have the Section 307(b) matter decided on the basis of the differences in population and relative importance of Stevens Point and Whiting. However, it cites no case where these have been decisional factors under Section 307(b) when the smaller community has no local transmission facility and there are stations already licensed to the larger community. The mere fact that Stevens Point is the larger and dominant community does not necessarily entitle it to a 307(b) preference. Indeed, because Stevens Point already has two local stations whereas Whiting has none, Stevens Point cannot be preferred over Whiting in this proceeding. Skipko's efforts to minimize the significance of Whiting as a community, and one without a need for a local radio station, is unavailing. Whiting is a viable independent community with governmental and civic organizations customarily found in communities of its size. There is no evidence that Whiting does not need a first local outlet and Skipko's arguments to the

contrary are rejected. Sharon's application is preferred under the Section 307(b) issue in this case.

Contingent Comparative Issue

51. Neither applicant has a media interest which is chargeable under the diversification criterion. Both applicants propose 100 percent fulltime integration of ownership and management, and all of their principals propose to move to the community for which each applicant has applied.

52. Skipko's integration proposal is enhanced by the long time local residence of its principals. Some small additional enhancement is warranted by virtue of Mr. Kotas' participation in limited civic activities.

53. Sharon's integration proposal is enhanced by Mrs. Nienow's female status, by Mr. Nienow's broadcast experience, very slightly by the participation of its principals in limited civic activities in the proposed service area, and slightly by Sharon's proposal for the provision of emergency standby power. Finally, Sharon receives a very slight preference for its proposed more efficient use of the frequency (Sharon would provide a fifth aural service nighttime to 5,717 more persons than would Skipko). On balance, Sharon receives a clear preference under the contingent comparative issue.

54. Sharon's application for Whiting is preferred under the Section 307(b) issue and this case is decided under such issue. If the case were to be decided under the contingent comparative issue, Sharon would still prevail. The public interest, convenience, and necessity will be served by a grant of the Sharon application for Whiting, Wisconsin.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or is reviewed by the Commission on its motion in accordance with the provisions of Rule 1.276,[1] the application of Sharon Broadcasting Corporation for a construction permit for an FM broadcast station at Whiting, Wisconsin, IS GRANTED and the competing application of Skipko Broadcasting, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

EDWARD LUTON, *Administrative Law Judge*

[1] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its public release pursuant to Section 1.276(d).

Authority Delegated, Basis for Review of
CATV Certificate of Compliance, Processing Held in Abeyance
CATV Registration Procedure
Forfeiture Authorization
Forfeiture Corrective Action Subject to Citation, Effect of
Forfeiture Procedures

By Direction Letter adopted reaffirming Commission forfeiture policies as they apply to cable television system operators. The Commission upholds, on review, the action of the Chief, Mass Media Bureau, denying a Petition for Declaratory Ruling which challenged the retrospective applicability of a 1983 implementing amendment to the Commission's forfeiture provisions in Section 1.80(d) of the Rules. —*Sol Schildhause*

FCC 85-163

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Sol Schildhause, Esquire
Farrow, Schildhause, Wilson & Rains
1101 Seventeenth Street, N.W.
Washington, D.C. 20036

Adopted: April 5, 1985; Released: April 9, 1985

Re: Implementation of P.L. 97-257; Amendment of Section 1.80(d) of the Commission's Rules and Regulations.

Dear Mr. Schildhause:

This letter refers to your "Petition to Review" the action of the Chief, Mass Media Bureau, denying your "Petition for Declaratory Ruling," filed April 5, 1983. In the latter petition you requested that the Commission declare that a March 30, 1983 amendment to Section 1.80(d) of the Commission's Rules "is prospective only and will not apply retroactively" to conduct by cable operators predating the amendment. Section 1.80 tracks the forfeiture provisions of the Communications Act and provides a procedure for imposing forfeitures on those "licensees, permitees, holders of certificates or of other authorizations" who "willfully or repeatedly" fail to substantially comply with the terms of their licenses or authorizations, with any provision of the Communication's Act,

or with any rule, regulation or order issued by the Commission; or who violate certain provisions of Title 18 or Title 47 of the United States Code. The Commission revised Section 1.80(d) in 1983 specifically to include cable operators in that list of persons who are subject to forfeiture penalties without the special procedural protection of prior notification of nonconforming conduct and opportunity for personal interview. [FCC 83-108, 48 Fed. Reg. 15631 (1983)]. The revised rule implements a 1982 amendment to Section 503(b)(5) of the Communications Act.

The Bureau Chief's action of October 18, 1983, denying your initial petition, found no basis for granting your request that the revised Section 1.80(d) "not apply to conduct by cable operators that occurred before the effective date [of the revision]." Your "Petition to Review," dated October 26, 1983, now claims that the Bureau Chief exceeded his delegated authority under Section 0.283 of the Commission's Rules "by taking to himself the resolution of an issue that is novel and substantial" and that he denied you "due process by not responding to principal contentions offered in support of the petition." Your contentions are that, prior to the 1982 amendment to Section 503 of the Communications Act, cable operators were entitled to the initial warning protections provided in Section 503(b)(5) because they were not in the category of "licensees, permittees, holders of certificates or of other authorizations" listed in that subsection. In this regard, you point out that in its 1978 *Report and Order* in CT Docket No. 78-206, 44 RR 2d 513 (hereinafter *1978 Order*), the Commission abandoned its certification process for cable television operators and instituted instead a registration scheme. You assert that registration is not an authorization of the type listed in Section 503(b)(5) and that the Commission's conclusion in its *1978 Order* that the change from certification to registration did not affect the "immediate" forfeiture liability of cable operators "was clearly an attempt to restructure the Communications Act."

As an initial matter, we do not agree that the Chief of the Mass Media Bureau, in disposing of your initial request for a declaratory ruling, exceeded the scope of the authority delegated to him by Section 0.283 of our Rules. The Commission has consistently and unequivocally held that Section 503(b) of the Communications Act does not require prior notice of violation to and subsequent nonconforming conduct by cable operators as preconditions to the imposition of forfeiture penalties. *See 1978 Order*, *supra*. Given this clear Commission precedent, the Bureau Chief's action did not constitute disposition of a substantial and novel issue in derogation of Commission authority. Moreover, we conclude that the Bureau Chief's action was not only procedurally proper in terms of the scope of his authority, but substantively correct as well in its treatment of the question raised in your original "Petition for Declaratory Ruling."

Congress amended Section 503 of the Act, effective March 23, 1978, specifically to extend the Commission's enforcement authority to cover cable television systems by enlarging the scope of forfeiture liability. *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977). At the time these amendments were adopted, and for some seven months after they became effective, cable systems remained subject to a certification requirement under our rules. Since, by the explicit terms of Section 503(b)(5), "certificate holders" were excluded from the prior notice provisions of that Section, there is no doubt that Congress subjected cable systems to full and immediate forfeiture liability by virtue of the 1978 amendments. This interpretation is further supported by the specific provisions of Section 503(b)(2)(A) which group cable systems, broadcast licensees and common carriers together as entities appropriately subject to the maximum forfeiture of $20,000. All other persons, including individuals or entities entitled to prior notice under Section 503(b)(5), are subject to a maximum fine of $5,000. Finally, the legislative history of the 1978 amendments plainly reveals that Congress intended by the prior notice provisions of Section 503(b)(5) to protect only those persons:

> who would otherwise be subject to immediate forfeiture for willful violations such as altering electronic devices which emit electromagnetic radiation (such as garage door openers or electronic water heaters or electronic ovens) in violation of FCC rules. Such a person could not be subject to forfeiture until there was clear evidence through the issuance of a citation of violation and interview opportunity that he or she was aware of the applicability of the Commission's rules and regulations governing the proscribed behavior. . . .

S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977) at 9.

Congress cannot reasonably be understood to have intended to include cable television system operators, who have been subject to direct and substantial Commission regulation for some twenty years, among the class of individuals likely to be unaware of their obligations under our rules and thus in need of special procedural protections in the context of forfeiture actions.

Given the foregoing considerations, we remain convinced that our decision in the *1978 Order* to continue treating cable system operators as subject to immediate forfeiture liability — despite our deletion of the certification mechanism — was fully consistent with the statutory provisions of Section 503(b) and the legislative intent behind those provisions. In the *1978 Order*, the Commission explicitly notified cable operators of its intent to levy forfeitures against violators in the cable television service in the same manner as if they held licenses. It did so in response to the concern expressed by some parties about the adequacy of forfeitures as an enforcement tool in the absence of the certification process. To make certain that deregulation in this context would not dilute the forfeiture

provisions of the Act or defeat the plain intent of Congress to apply the immediate forfeiture provisions to cable television systems, the Commission clarified that the registration statement adopted in lieu of certification was sufficient license or authorization under Section 503 so that a forfeiture may be imposed without the initial warning. As the Commission stated, "[w]e have not abandoned the substantive provisions of our rules [in substituting a registration requirement for the certification process]. Rather, we are adopting simpler, more efficient procedures for the initiation of new services, and we will continue our vigorous enforcement of the rules as we seek to fulfill the purposes for which they were adopted." *1978 Order*, *supra* at 519. As the Commission noted:

> [t]he meaning of the terms "license, permit, certificate, or other authorization" is not definitively set forth either in the Communications Act or in the legislative history of the Communications Act Revisions of 1978. However, the legislative history indicates that the initial warning approach of Section 503(b)(5) was included in the amendments to protect those persons *who might not reasonably know they were* engaging in an activity *regulated* by the Commission. See, S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977). Cable operators are presumed to be aware that their activities are regulated as evidenced by the registration filing requirement. Also, the term "license" is defined in the Administrative Procedure Act, 5 USC §551, as the "whole or a part of an agency permit, certificate, approval, *registration*, charter, membership, statutory exemption or other form of permission."

Id. at 523, n.13. (emphasis added.)

In sum, your apparent contention that the *1978 Order* impermissibly "restructured" the Communications Act is simply unsupported by any reasonable construction of the 1978 forfeiture amendments. Moreover, we find untenable your suggestion that the 1982 amendment of Section 503(b)(5) — which revised the stated scope of that provision by specifically excluding cable television systems from the prior notice requirements — demonstrates that cable systems were not, before such amendment, subject to immediate forfeiture liability.

The amendment to Section 503(b)(5) merely ratified the long standing Commission practice of treating cable operators as being subject to forfeiture proceedings in the same manner as licensees. The revision made it clear that cable operators, though no longer subject to certification, were still among the class of persons regarded as "engaging in activities for which a license, permit, certificate, or other authorization is required" that Congress intended to be charged with knowledge of the Commission's rules. As indicated in the House Conference Report accompanying the bill to amend Section 503(b)(5) by inserting the words "or is a cable television operator" after the list indicated above:

> This amendment to Section 503(b)(5) makes clear that, for purposes of the forfeiture provisions of the Act, cable system operators are to be treated in the same manner as licensees or other holders of Commission authorizations. This amendment ratifies current Commission practice.

H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 58 (1982). Such ratification connotes Congressional concurrence that the Commission was authorized to take forfeiture action against cable operators, without prior citation, before and after the certification procedures were abandoned in the *1978 Order*. As such, the Commission's 1983 change in Section 1.80(d) of its Rules implementing the revision of Section 503(b)(5) of the Act, is not an *ex post facto* application of the law to cable operators "registered with the Commission prior to the amendment," as you so claim. In any event, we note that the Constitutional proscription of *ex post facto* laws (U.S. CONST. art. I, § 9, cl. 3) has long been held to apply only to criminal provisions. *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Calder v. Bull*, 3 Dall. 385 (1798). The forfeiture provisions of the Communications Act, however, are plainly civil remedies. A "forfeiture is a civil penalty authorized under the Communications Act for certain violations of the act or related communications statutes, treaties, rules or regulations." S. Rep. No. 95-580, *supra* at 4.

Accordingly, IT IS ORDERED, THAT the "Petition to Review" dated October 26, 1983, filed by Farrow, Schildhause, Wilson and Rains, IS DENIED. Authority for this action is contained in Section 4(i) and (j) and 303 of the Communications Act of 1934, as amended.

BY DIRECTION OF THE COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Action, Appealable
Application, Dismissal of
Failure to Prosecute

Review Board affirms ALJ's dismissal of an application in a remand proceeding where that applicant had lost in an initial Decision prior to remand and had failed to except to the Initial Decision.
—*South Florida B/cing Company, Inc.*
BC Docket No. 82-731

FCC 85R-28

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
South Florida Broadcasting Company, Inc. North Miami, Florida	BC Docket No. 82-731 File No. BPH-810427AJ
Radiocentro Broadcasting Company Miami, Florida	BC Docket No. 82-733 File No. BPH-810630AJ
First Black Broadcasters Of Miami, Inc. Miami, Florida	BC Docket No. 82-734 File No. BPH-810630AK
Constance J. Wodlinger Miramar, Florida	BC Docket No. 82-736 File No. BPH-810630AT
Onyx Broadcasting Of Miami, Inc. Miami, Florida	BC Docket No. 82-737 File No. BPH-810701AC

Rana Broadcasting Company, Inc. Liberty City, Florida	BC Docket No. 82-738 File No. BPH-810701AE
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1985; Released: March 29, 1985

BY THE REVIEW BOARD:

1. The Board has before it an appeal filed on March 6, 1985 by Southwest Radio Enterprises, Inc. and directed to the *Order*[1] which dismissed, with prejudice, its mutually exclusive application for a construction permit in the above-styled proceeding. Also before the Board are oppositions to that appeal filed by other mutually exclusive applicants.

2. The proceeding is now before the Administrative Law Judge upon remand of his *Initial Decision*.[2] However, Southwest Radio filed no exceptions to the *Initial Decision*,[3] "and did not attend any session conducted by the Review Board or the further hearing before the presiding Judge."[4]

3. In its appeal, Southwest Radio — which did not prevail in the *Initial Decision* — recites the correct rule of law, to wit[5]:

> When any party fails to file exceptions within the specified time to an Initial Decision which proposes to deny its application, such party shall be deemed to have no interest in further prosecution of its application, and its application *may be dismissed* with prejudice for failure to prosecute. (under-scoring added).

It contends "that dismissal is permissive rather than injunctive."[6] Even if we accept the latter claim, there is no basis on which to overrule the ALJ's dismissal, since we find no abuse of discretion in the ALJ's exercise of his "permissive" authority. Although we did not specifically dismiss Southwest Radio's application in our remand order, any such oversight was

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[1] FCC 85M-863, released February 27, 1985 (AL J).

[2] *See Memorandum Opinion and Order*, FCC 84R-89, released December 12, 1984 (Rev. Bd.) (*reprinted at* 57 RR 2d 495 (1984)), *remanding* FCC 84D-30, released May 16, 1984 (AL J) (*Initial Decision*).

[3] *See* FCC 85M-863, *supra*, at 1.

[4] *Id*. However, the AL J's observation that Southwest Radio did not attend any post-remand sessions before him may be inaccurate. *See* Appeal at 4. For instant purposes, this dispute becomes irrelevant.

[5] Appeal at 4 (*quoting* 47 CFR §1.276(b)).

[6] *Id*.

merely technical inasmuch as Southwest Radio — not having filed exceptions — was hardly a "party" to be given much attention.[7] Southwest Radio's sudden reinterest in its long-ago denied application may be — with the coming of cruel April — no more than a product of the mixing of[8]:

> memory and desire, stirring
> Dull roots with spring rain.

The ALJ's action was correct.[9]

4. ACCORDINGLY, IT IS ORDERED, That the Appeal From Order Dismissing Application, filed March 6, 1985, by Southwest Radio Enterprises, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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[7] Procedurally speaking, a party either invokes the Board's jurisdiction by filing exceptions to an initial decision, 47 CFR §1.276, or any objection to an initial decision "not saved by an exception ... is waived." *Id.*, §1.277(a). In that Southwest Radio did not except to its loss before the ALJ (or to any of the legal or factual bases therefor), it has lost.

[8] T.S. Eliot, *The Wasteland*, I, *The Burial of the Dead.*

[9] We trust that Southwest Radio's resurrection is not drectly related to the fact that the remaining parties have apparently agreed to settle this case amicably, *see*, *e.g.*, First Black Broadcasters' Opposition To Appeal at 3, which settlement will doubtlessly involve significant monetary consideration. For if the filing of an application purely for the purposes of extracting a settlement is prohibited, *see* 47 U.S.C. §311(c)(3) (as amended by Pub.L. 97-259, 96 Stat. 1087, 1095, September 13, 1982), then the resurrection of a defunct application purely for such purposes may be no less a transgression.

International Agreements and Treaties
International Telecommunication Union
Satellite Orbit
World Administrative Radio Conference

First Report and Order adopted setting forth findings in an Inquiry relating to preparation for an International Telecommunication Union World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing it (Space WARC), and conveying to the Department of State recommended Initial Proposals for the Conference first session.
—*Space Warc*
Gen. Docket No. 80-741

International Agreements and Treaties
International Telecommunication Union
Satellite Orbit
World Administrative Radio Conference

The findings and proposals closely parallel the first session agenda, focusing largely on the issues posed in the key agenda item dealing with new planning approaches. They indicate that for the most intensely used frequency bands of the Fixed-Satellite Service, a range of alternative international arrangements for preventing harmful interference between satellite systems can be considered. However, such arrangements must be pragmatic and workable and contain several key features described in the Report and Order.
—*Space WARC*
Gen. Docket No. 80-741

FCC 85-94

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
An Inquiry Relating to Preparation for an International Telecommunication Union World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing It.	General Docket No. 80-741

First Report And Order

Adopted: 1 March 1985; Released: 1 March 1985

By The Commission:

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APPENDICES

App. A List of Comments Filed in Response to the Fourth Notice.

App. B United States of America Proposals recommended by the FCC.

I. Introduction and Summary

1. This *First Report and Order* culminates nearly five years of preparations for the 1985 first session of an international conference dealing with communication satellites in the geostationary-satellite orbit (GSO).[1] The principal objective of the Conference is to improve the current international arrangements for preventing harmful interference among communications satellites, as appropriate.

2. Because the effects of this Conference are expected to focus largely on commercial activity of the Commission's licensees, as well as our associated regulatory policies and administrative responsibilities, we have maintained a lead role in United States preparations in cooperation with the Department of State and the National Telecommunications and Information Administration. In this *First Report and Order* we present our basic views on the work of the first session, and convey them, together with our recommended initial proposals for the work of the Conference, to the Department of State. These findings and proposals are based upon the record of this proceeding, the advice of our staff, and particularly the comments of the private-sector submitted to us either in the docket or through our Space WARC Advisory Committee. The decisions reached in the *First Report and Order* have been coordinated with Executive Branch agencies.

3. Our findings and proposals below are organized to parallel the first session agenda, focusing largely on the issues posed in the key agenda item dealing with the various planning approaches. We begin by noting that the situation prevailing for communication satellites using the GSO is extremely complex, heterogeneous and dynamic, and that the existing arrangements for satellite systems have worked reasonably well in this

[1] The formal title of the conference is the "World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of Space Services Utilizing It," frequently referred to as the Space WARC. It will meet in two sessions in 1985 and 1988 as an organ of the International Telecommunication Union (ITU), an international organization in which nearly all nations participate to coordinate telecommunications. The ITU short-form reference to the first session is now WARC-ORB(1), although WARC-ORB-85 is also used.

environment.[2]

4. Based on the situation prevailing, we conclude that only the Fixed-Satellite Service bands between 3700 and 7075 MHz should be considered for any alternative planning approach at this time. This Service is currently employed in a broad range of applications and offers the promise of even more innovative ones in the future. Certain portions of these bands are the most intensely used, and this Service appears to be of greatest interest to ITU Member countries. Our criteria and proposals are also consistent with the CCIR and IFRB Reports.

5. For this Service and these bands, we find that a wide range of planning approaches are capable of providing equitable access in practice and comporting with the operations of our licensees and our regulatory policies and practices. However, neither adamant adherence to the existing arrangements nor a detailed, long-range assignment plan devised at WARCs are likely to provide the basis for a workable resolution of the various concerns that will be expressed at the Conference.

6. We choose instead to focus on the several critical characteristics that any workable planning approach must possess in the highly complex, heterogeneous, and dynamic environment that exists in these bands. In our findings and proposals we describe and discuss each of these characteristics. They are articulated in our recommended proposals as both general principles and explicit criteria.

7. Any planning approach must:

- Be capable of accommodating increased demand for GSO/spectrum access, by means of progressive reduction in necessary intersatellite spacing and/or progressive increase in the frequency reuse potential of individual orbit locations.
- Assure that existing systems will continue to be accommodated as new systems are introduced and that the burden of access will be shared among all systems over time.
- Provide for effective technical and operational means by which affected Administrations may resolve potential interference problems between networks on a timely and equitable basis. The means provided for such conflict resolution should recognize the use of world, regional, subregional or bilateral forums, as appropriate.
- Include only realistic requirements in any planning approach.

[2] *See* CCIR, Technical Bases for the World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing It (WARC-ORB (1)), Report of the CCIR Conference Preparatory Meeting (CPM), Joint Meeting, Study Groups 1, 2, 4, 5, 7, 8, 9, 10, and 11, Geneva, 25 June-20 July, 1984 [in three parts], hereafter cited as *CPM Report*; Report of the IFRB to the World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing It (ORB (1)), Geneva, 8 August — 13 September 1985, appended to IFRB Circular-letter No. 600 (10 December 1984), hereafter cited as *IFRB Report*.

- Be responsive to the complex, heterogeneous, and dynamic nature of existing and planned fixed-satellite systems at reasonable administrative costs.

II. Background

8. This Conference is part of a continuing history of cooperation among the nations of the world to effect efficient interference-free communication by radio. That history began in 1903 when the first international arrangements for radio were devised by the major powers of the time because they recognized it was in their mutual interest to do so. Driven by countless new technologies, innovative uses, and more expansive use of the radio spectrum, these cooperative endeavors have been increasingly pursued ever since.

9. The challenge then, as today, involved a complex balancing of sometimes conflicting objectives: international cooperation versus national sovereignty; protection of costly investment versus encouraging technological advances and accommodating new facilities; maximizing flexible arrangements versus minimizing administrative costs; maximizing technical efficiency versus minimizing operational constraints.

10. With the advent of radiocommunication via satellites, the international community devised the first new ITU provisions for them in 1959, followed by further additions and modifications in 1963, 1971, 1977, 1979 and 1983. The call in 1979 for a major conference on communication satellites brought about numerous activities within the ITU, regional telecommunication organizations, and the United States. In the sections below, these activities of the past five years are portrayed.

A. Domestic Preparatory Activity

11. United States preparations for the Space WARC began in early 1980, not long after the delegation returned from WARC-79. Staff members of the Commission, Department of State, and the Department of Commerce's National Telecommunications and Information Administration (NTIA) marshalled a variety of resources to inform and bring together all the interested parties in the United States to prepare for this Conference. These resources included: an FCC proceeding; several public advisory committees for the private-sector, one of which was exclusively dedicated to the Space WARC; several interagency committees; delegations for related international meetings; bilateral consultations; ad-hoc domestic conferences and meetings. In addition, individual federal agency staff committees and assignments were established. The resultant activity is summarized in the sections below.

1. History of This Proceeding

12. Purpose. Space WARC is expected to focus on the most intensely used bands of the Fixed-Satellite Service. Thus, the United States

interests most directly affected will largely be those of the Commission in regulating the use of communication satellites for the provision of commercial fixed-satellite services, and those of the private sector in actually owning or using these facilities. While other U.S. government agencies have interests that could be affected by the Space WARC, current indications are that the focus will be on the bands used or planned to be used by our commercial satellite industry.

13. For the past five years, this proceeding has served those interests by providing a focal point for public policy making for the Conference. It is largely the private-sector who manufactures, owns, operates, and utilizes the satellite systems that may be affected by Space WARC, and who by virtue of these activities, also possesses a wealth of expertise on the technical and operational factors that will be considered in depth at the Conference. We have sought to involve them in our policy making processes in several ways. The most formal means was through this Space WARC proceeding. Dozens of comments were submitted in response to our four Notices of Inquiry. Each successive Notice attempted to join these comments together with other domestic and international developments to sift out the core issues and potential proposals for the Conference.

14. First and Second Notices. We initiated the proceeding by adopting a *Notice of Inquiry* in November 1980 that described the general issues associated with the Conference, solicited initial comments, and established General Docket No. 80-741 to provide a repository for the comments and other materials associated with the proceeding.[3] In response to the initial *Notice*, eleven parties filed comments that led in May 1982 to the adoption of a *Second Notice* that expressed the general interests that have guided our preparatory effort. These interests included: availability and flexibility of resources; international and domestic satellite facilities; markets for advanced technology; national security; and international comity.[4] These early Notices were largely exploratory in nature, prior to any agreed Conference agenda.

15. Third Notice. A year and a half passed before the adoption of a *Third Notice.*[5] During that interval, the ITU established a definitive agenda for the Conference, the Region 2 Broadcasting-Satellite Administrative Conference was held, and an early international preparatory meeting occurred.[6] On the basis of emerging international discussions on

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[3] *See Notice of Inquiry*, FCC 80-697 [published at 45 Fed. Reg. 85126] (adopted 25 November 1980).

[4] *See Second Notice of Inquiry*, FCC 82-214 [published at 47 Fed. Reg. 24223] (adopted 13 May 1982).

[5] *See Third Notice of Inquiry*, FCC 83-452 [public notice published at 48 Fed. Reg. 47069] (adopted 8 October 1983).

[6] *See id.*, at 3-4, paras. 3-9.

Conference issues, the *Third Notice* sought " . . . to explicitly establish a few basic positions for ORB(1) to guide our further preparations and dialogue."[7]

16. In the *Third Notice*, the Commission found that the WARC-ORB(1) agenda item dealing with the "situation prevailing" was an important part of finding a basis for common agreement on the extent of the difficulties that gave rise to the Conference. It also noted that a broad range of alternative arrangements must be considered by the Conference because of a parity that exists among WARC-ORB(1) agenda items 2.2 and 2.5. Radio services other than the Fixed-Satellite or Broadcasting-Satellite Services in appropriate bands below 15 GHz, and the associated Broadcasting-Satellite feeder links above that limit, were found unsuitable for alternative arrangements. And lastly, one extreme outcome of the Conference, i.e., "a detailed *a priori* assignment plan contained in a treaty instrument for any communication satellite service other than broadcasting-satellite" was viewed as an unacceptable result.[8]

17. The Fourth Notice. In late 1983 and early 1984, a number of domestic and international events occurred that were relevant to the Space WARC. These included the submission of a report by our Space WARC public advisory committee, preparation of important recommended U.S. submissions to several CCIR forums by the U.S. CCIR public advisory committee, the adoption of various reports by CCIR Interim Working parties, the submission of U.S. contributions to the CCIR Conference Preparatory Meeting (CPM) for WARC-ORB(1), and the first session of the H.F. WARC. The *Fourth Notice* was adopted in May 1984, following most of these events, but prior to the CPM.[9]

18. The *Fourth Notice* directly addressed the Conference agenda, and for each item set forth some preliminary views. That *Notice* was also intended to operate in concert with U.S. participation at the CPM. It included a general discussion of "equitable access," the factors to be considered as part of the "situation prevailing," the bands and services that should be considered for alternative arrangements, a framework for analyzing and comparing alternative arrangements, and the features that constitute any planning approach.

19. Most significant, however, were three " . . . central questions that must be faced within the system of cooperation for achieving equitable access in practice."

(1) What should be the nature of the international protection afforded upon completion of the implementation phase, including the time period such protection is effective?

[7] *Id.* at 2, para. 2.

[8] *Id.* at 15, para. 37.

[9] *See Fourth Notice of Inquiry*, 98 FCC 2d 402 (1984).

(2) What additional principles and criteria should be considered during the harmonization phase for detecting and resolving conflicts among satellite networks?

(3) Whether any new institutional mechanisms should be used to accomplish harmonization of satellite networks and when should those mechanisms be invoked?[10]

In response to the *Fourth Notice*, six parties filed comments that are discussed in subsequent sections below.

20. The *First Report and Order* sets forth our summary findings with respect to WARC-ORB(1) and conveys our initial proposals for the work of the Conference to the Department of State. It is based not only on the comments filed, but also the second report of our Space WARC public advisory committee, the recommendations of other government agencies, the work of the core delegation group, our experience at the CPM, and subsequent bilateral discussions. Following the first session of the Conference, we anticipate adopting several additional Notices of Inquiry and a Second Report and Order before the second session in 1988.

2. Responses to the Fourth NOI

21. Six parties filed comments and three filed replies. See Appendix A. They addressed the specific questions posed in the *Fourth Notice*, and conveyed some views on the Space WARC and their CPM experience. Only the general thrust of these views are reviewed in this section of the *Report and Order.* Their specific remarks are considered in more detail in the discussion of substantive issues in Part III, below.

22. Most commenting parties were concerned about the perceived unresponsiveness of the United States in the face of markedly increased numbers of satellites in orbit and the strongly articulated concerns of many administrations that the existing ITU arrangements are becoming unsatisfactory for some bands of the Fixed-Satellite Service. For example, GTE pointed out that change was inevitable in the present arrangements for coordinating new satellite networks for technical as well as political reasons, and that increasing demands on portions of the orbital arc have already complicated greatly the task of coordinating new satellite networks serving the U.S.[11]

23. Pursuing a similar thought, COMSAT noted that it is not only coordination that will cause increasingly insurmountable problems to an isolated access seeker. The very density of the future satellite population and the intricate interactions among assignments in adjacent orbit locations or with adjacent service areas will make it nearly impossible to select a viable orbit location for a new network without the aid of a fairly comprehensive computer capability and data base. COMSAT suggested

[10] *Id.* at 424, para. 52.

[11] *See GTE Reply Comments* at 3.

that "... the days of 'inspecting' the orbit for a likely suitable orbit location for a new network will soon be over."[12]

24. Focussing particularly on the matter of responsiveness, GTE in its reply comments suggested that a good faith recognition of the concerns of other administrations, and a good faith evaluation and response to their proposals, would place the U.S. in a position of leadership at the Conference and afford a much greater opportunity to influence its outcome.[13] GTE went on to warn that ignoring concerns about equity and concrete proposals of other Administrations, and failure to supply concrete U.S. proposals, will lead to a diminution of the U.S. influence at WARC-ORB(1).[14]

25. Pursuing the same theme, SBS indicated that the desires of many Administrations for "guaranteed" access to the GSO and associated frequency bands requires U.S. consideration of meaningful changes to the current *a posteriori* procedures and recognition of future realistic satellite requirements of developing nations.[15]

26. Most parties submitted numerous specific suggestions on how to accomplish this. A common element of virtually all the comments was an emphasis on pragmatic alternative arrangements for the most intensely used bands and services, that bring together all the affected parties within regional or sub-regional forums.[16]

27. These general comments, as well as the more specific ones discussed further below, have been useful in developing this *Report and Order*. We believe that our policy determinations on these matters and the initial proposals we are forwarding to the Department of State are responsive to these concerns.

3. Work of the Public Advisory Committees

28. The Space WARC Advisory Committee. In conjunction with our proceeding, we also created a public advisory committee that has brought scores of experts together to provide advice on nearly all aspects of the Conference.[17] Every interest in the field of communication satellites — manufacturers, operators, users, and the academic community — were represented.[18] After more than two years of labor, the Advisory Commit-

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[12] *COMSAT Comments* at 9-10.

[13] *See GTE Reply Comments* at 7.

[14] *See id.* at 10.

[15] *See SBS Reply Comments* at 1.

[16] *See id.* at 4.

[17] *See Memorandum Opinion and Order*, FCC 81-317 [published at 46 Fed. Reg. 42758] (1981).

[18] Persons involved in the Committee's work has included during the three years of its activities: 60 affiliated with satellite operators and users, 10 affiliated with manufacturers, 59 affiliated with consulting and law firms (many of whom represented additional

tee on Space WARC submitted its First Report. As noted by the Committee's chairman in his letter of submittal, "a substantial record of historical, scientific and engineering data was compiled, substantial review of related ITU activities was conducted, demand projections and technical projections of future capabilities were developed, and a substantial body of research and interpretative data was studied."[19] Material developed by the Advisory Committee was included in the United States contributions to CCIR preparatory meetings for WARC-ORB(1).

29. In 1983, the Committee's Charter was renewed[20] and the Committee in January 1985 furnished its Second Report to the Commission's Chief Scientist.[21] The Committee's Report reflected the agenda outline of the Conference, and contained its advice on these matters. This work represented many hours of work by several score individuals during a very short period of time and is greatly appreciated. The findings and recommendations of the Committee are introduced in the context of our discussion of each issue in part III, below.

30. Other Public Advisory Committees. In addition to our Space WARC committee, other public advisory committees were involved in preparations for the Conference. These other forums included the various subcommittees within the Department of State's U.S. Organization for CCIR (USCCIR) which prepared for CCIR Study Group and Interim Working Party meetings dealing with Space WARC issues. Many of the private-sector participants in our Space WARC advisory committee also participated in these other committees. These committees provide a means for the private-sector to share their expertise and views, and participate in preparing for the Space WARC.

4. Work of the Federal Interagency Committees

31. Between 1980 and 1984, the senior staff of the Commission, Department of State, and NTIA responsible for Conference preparations met on a regular basis to coordinate their activities under the aegis of an informal Space WARC Inter-agency Coordinating Committee. During this period, it managed the common Space WARC preparatory effort, devised basic strategy, and prepared U.S. proposals and positions for early international meetings.

32. In 1980, NTIA established a specialized Space WARC preparatory sub-committee within the InterDepartment Radio Advisory Committee

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operators and manufacturers), and 25 affiliated with universities or public interest organizations.

[19] *See* Letter of Transmittal from Chairman, Space WARC Advisory Committee to Chief Scientist, Federal Communications Commission, 22 December 1983.

[20] *See Memorandum Opinion and Order*, FCC 83-383 (adopted 10 August 1983).

[21] *See* Letter of Transmittal from Chairman, Space WARC Advisory Committee to Chief Scientist, Federal Communications Commission, 31 January 1985.

(IRAC) and designated it Ad-Hoc 178. IRAC brings together government agencies to advise NTIA on Executive Branch policies related to radiocommunication. Since 1980, Ad-Hoc 178 has met monthly to follow Conference related developments, prepare policy options on WARC-ORB(1) matters for the Executive Branch, and assist in coordinating Executive Branch views on FCC Notices of Inquiry.

33. In early 1984, the Department of State established an interagency coordinating group and staff office on Space WARC. The head of the U.S. delegation to WARC-ORB(1) was named in mid-1984 and under his leadership a core delegation group has been working on preparatory matters for the Conference first session. The full delegation is expected to be selected in the near future.

B. Preparatory Activity of the ITU

34. Nearly every ITU organ has undertaken some activities that relate to WARC-ORB(1). These include the Consultative Committees, the IFRB, the General Secretariat, other Administrative Radio Conferences, and the Plenipotentiary Conference/Administrative Council.

35. The CCIR. Within the International Radio Consultative Committee (CCIR), the major event was a Conference Preparatory Meeting (CPM-ORB(1)) convened 25 June 1984 for four weeks. An eighty page CPM Report and a 323 page annex were produced that addressed each agenda item of the Conference.[22] The United States actively participated in the work of the CPM, working together with the many other attending nations.[23]

36. Some initial conclusions were reached that reflect a consensus among the international community. The more important of these conclusions are discussed in Part III, below. We recognize that the Administrative Supplement to the Report does contain several statements by both developing and developed countries indicating a dissatisfaction with certain text concerning the range of planning methods discussed at the CPM.[24] However, these views do reflect a net CPM result: that for the most intensely used bands of the Fixed-Satellite Service, neither the existing ITU arrangements nor long-range inflexible planning will be useful in achieving a consensus on an approach that provides equitable access.

37. Prior to the CPM, a Conference Consultative Group (CCG) had met in July 1983, to begin a preliminary dialogue on important Conference

[22] *See CPM Report.*

[23] The CPM was attended by 340 delegates from 61 Administrations and 33 other organizations. *See id.*, Part I at 2.

[24] *See id.*, Part III, B/184 at 6-11.

issues, and establish the outline for the CPM Report.[25] In addition, some of the groups within the CCIR that specialize in communication satellite matters met to assist the CPM by assembling information relating to particular radio services. This includes the Interim Working Party (IWP) 2/2 meeting on 3-7 December at Geneva to consider Space Research and Radioastronomy matters; the IWP 10/11-1 meeting on 24-27 January 1984 at Washington to consider the Broadcasting-Satellite Service; the IWP 8/7 meeting on 23-27 January 1984 at Mclean, Virginia, to consider the Mobile-Satellite Service; and the IWP 4/1 meeting on 13-22 February 1984 at Geneva to consider the Fixed-Satellite and Inter-Satellite Services. The product of each of these groups was a report containing material for possible inclusion in the CPM report.

38. The Joint Plan Committees. The Joint CCIR/CCITT Plan Committees were organized under the CCITT in the late 50's to study the interconnection of national telecommunication networks at both regional and worldwide levels. The Committees currently have authority to "... develop a General Plan for the international telecommunication network to facilitate coordinated development of international telecommunication services."[26] In conjunction with these responsibilities, the Committees meet regularly to estimate the telecommunication circuit requirements, including a separate section dealing with satellites, of all participating nations.[27] The next meeting of the World Plan Committee will be hosted by the United States at Washington DC in April 1985.

39. The General Secretariat. Through the work of the General Secretariat's Technical Cooperation Department, developing countries have for the last several years been assisted in preparing regional and national telecommunication plans, including future satellite requirements. This work is similar to and interrelated with that of the Joint Plan Committees described above.[28]

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[25] *See* CCIR Administrative Circular No. 254, 22 August 1983.

[26] Art 11, Sect. 4, International Telecommunication Convention, Nairobi, 1982.

[27] *See* General Plan for the Development of the Interregional Telecommunication Network, 1980-1983-1987 (Paris, 1980); Supplement to the World Plan, 1982-1989 (1982); General Plan for the Development of the Regional Network in Africa, 1982-1986-1990 (Libreville, 1983); General Plan for the Development of the Regional Network in the Region of Europe and Mediterranean Basin, 1978-1981-1983-1985 (Santiago de Compostela, Espana, 1979); Supplement to the Europe and Mediterranean Basin Plan, 1980-1984-1986-(1988) (1982); General Plan for the Development of the Regional Latin American Network, 1980-1984-1988 (Buenos Aires, 1981); General Plan for the development of the Regional Asian and Oceanian Network, 1981-1984-1990 (Manila, 1982); Supplement 1 (N=1982) to the Asia and Oceania Plan (1983).

[28] *See, e.g.*, Panaftel, ITU, Geneva 1983; Medarabtel, ITU, Geneva 1983; List of Projects on Master Plan for Development of Telecommunications, Annex, CCIR Doc. IWP 4/1-1154 (20 Feb 1984).

40. The General Secretariat is also organizing three major preparatory seminars between March and May 1985 in Buenos Aires, Nairobi, and Bangkok. These seminars will afford an opportunity for nations throughout the world, and particularly smaller nations near those locations, to gather in the months immediately preceding the Conference, and discuss the important issues likely to arise in August at the Space WARC. In addition, the General Secretariat will provide rather considerable administrative support for the first session; and it is the Secretary General and the Deputy Secretary General who will personally assist in the organization of the Conference.

41. The Maitland Commission. The 1982 Nairobi Plenipotentiary Conference established an Independent Commission for World Wide Telecommunications Development.[29] It was given a mandate to recommend ways in which the expansion of telecommunications across the world could be stimulated. The Maitland Commission drew upon a wide range of published and volunteered materials on telecommunication, held several seminars, and recently issued its Report.[30] The Maitland Commission in its consideration of choices of technology recognized the importance of satellite systems for the rapid growth of telecommunication services in developing countries and emphasized the need for satisfactory decisions at the Space WARC.[31] In addition, the Maitland Commission "noted suggestions that the economic value of geostationary orbit and the radio spectrum might be used to finance telecommunications development."[32] The Report did admit, however, that this is a theoretical concept, and further work is needed to determine whether this idea is practical.[33]

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[29] This ITU Commission is popularly referred to as the "Maitland Commission" after its Chairman, Sir Donald Maitland of the United Kingdom.

[30] *See* The Missing Link, Report of the Independent Commission for World Wide Telecommunications Development, December 1984.

[31] *See id.* at 35, Chap. 4, para. 34.

[32] *Id.* at 62, Chap. 9, para. 33.

[33] *Ibid.* For example, this so-called "resource," sometimes simplistically referred to as orbit/spectrum, is actually a construct describing the physical properties associated with the radio energy used for transmissions. These physical properties are: instantaneous frequency, time, spatial volume (generally defined by a point in the GSO and a bounded area on the surface of the earth), and wave polarization. The instantaneous relationships between these properties can be very complex, for example, when spread spectrum transmissions are used. It is difficult to envision how such a highly complex, dynamic construct of physics could be packaged so as to have economic value.

There are, in addition, fundamental legal and policy questions. For more than eighty years, the basis for international cooperation in these matters has rested on the understanding that each is sovereign to employ radio as it sees fit, absent an obligation not to cause harmful interference to the facilities of other nations operating in accordance with accepted ITU provisions. The assessment of a fee under some kind of international regime as a condition to operate a radio facility would appear to be an unacceptable intrusion on national sovereignty. In addition, such a scheme would also

Although the work of the Maitland Commission has a nexus to the Space WARC, the follow-up work of that Commission should proceed separately from that of the Conference.

42. The IFRB. Both Resolution No. 3 of WARC-79 and the WARC-ORB(1) agenda call for "the IFRB to prepare a report on the operation of the procedures of Articles 11 and 13 including information about difficulties which may be reported to the IFRB by Administrations in gaining access to suitable orbital locations and frequencies. . . ." On 10 January 1984, the Board issued IFRB Circular-letter No. 567 requesting individual administrations to report any of these difficulties. The United States and 34 other countries submitted responses.[34] On 10 December 1984, the Board issued an 81 page Report that contains ten chapters devoted to:

- IFRB activities relating to the application of the regulatory provisions applicable to space radiocommunications.
- Comments on the application of the provisions of the Radio Regulations relating to the allocation of frequency bands.
- Comments on the coordination provisions.
- Comments on the application of the provisions relating to the broadcasting-satellite service.
- Comments on the application of the provisions relating to notification and registration.
- Rules of procedure.
- IFRB Publications and service documents.
- Difficulties reported by Administrations in seeking access to orbital positions and to the frequency spectrum.[35]

43. The Board's Report described in considerable detail the existing ITU arrangements for communication satellites and the associated administrative activity. It also indicated several areas where those arrangements might be improved. The most interesting and potentially important material, however, is found in Annex F of the Report, which reproduces each of the 34 comments submitted by Administrations "... concerning difficulties in gaining access to suitable orbital positions and frequencies." Only three Administrations, France, India, and Mexico

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appear to run afoul of the Treaty on the Peaceful Uses of Outer Space which asserts the freedom of all nations to use outer space.

[34] *See* Letter from Director, Office of International Communications Policy, Department of State, to A. Berrada, Chairman, IFRB 27 April 1984. The letter was attached as Appendix D to the *Fourth Notice, supra.*

[35] Report of the IFRB to the World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing It (ORB (1)), Geneva, 8 August - 13 September 1985, appended to IFRB Circular-letter No. 600 (10 December 1984).

indicated actual difficulties; and only two others, Ecuador and Yugoslavia, indicated anticipated future difficulties.[36]

44. Other Administrative Radio Conferences. Several Administrative Radio Conferences have been convened during the past five years to carry out various kinds of planning for broadcasting services.[37] However, it is very important to distinguish between the kind of planning approaches that may be acceptable for broadcasting services, and those approaches appropriate for the Fixed-Satellite Service (FSS). The considerable homogeneity and static operational configurations of broadcast facilities allow the use of relatively rigid and detailed planning approaches. We have previously found such approaches unsatisfactory for the highly dynamic and inhomogeneous FSS.[38]

45. Plenipotentiary Conference/Administration Council. The ITU's two major administrative organs have both taken actions that bear upon Space WARC. The Plenipotentiary Conference at its Nairobi, 1982, session added to the Space WARC agenda the incorporation of the Final Acts of the Region 2 Broadcasting-Satellite Conference into the Radio Regulations. In addition, the Plenipotentiary made minor adjustments to Article 33 of the International Telecommunication Convention dealing with the "orbit/spectrum resource." The activity of the Administrative Council relative to the Space WARC was chiefly its work in preparing the agenda of the Conference at the 1982 and 1983 sessions, and scheduling it for the five and a half weeks beginning on 8 August 1985. Following the first session of Space WARC, it is the Council that will be faced with allocating the ITU resources necessary to carry out the decisions reached.

C. Preparatory Activity of Other International Organizations

46. Several other international organizations of both global and regional character have engaged in preparations for the Space WARC. Those in which the United States participates include the United Nations, the International Telecommunications Satellite Organization (INTEL-

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[36] *See id.* at 76 and 79.

[37] *See* Report to the Second Session, Region 2 Administrative Radio Conference for Medium Frequency Broadcasting (1980); Final Acts of the Region 2 Administrative Radio Conference for Medium Frequency Broadcasting (1981); Report to the Second Session of the Conference, Region 1 Administrative Radio Conference for the FM Broadcasting Service in the VHF Band (1982); Final Acts of the Region 2 Administrative Radio Conference for the Broadcasting-Satellite Service (1983); Report to the Second Session of the Conference, World Administrative Radio Conference for the Planning of the HF Bands Allocated to the Broadcasting Service, First Session, Geneva (1984); Final Acts of the Region 1 Administrative Radio Conference for the FM Broadcasting Service in the VHF Band (1984).

[38] *See Third Notice of Inquiry, supra*, at 4, paras. 8-9 (distinctions with respect to the Broadcasting-Satellite Service); *Fourth Notice of Inquiry, supra*, at 420-21, paras. 42-43 (distinctions with respect to the H.F. Broadcasting Service).

SAT), the Inter-American Telecommunications Conference (CITEL), among others.

47. UNITED NATIONS. The Second United Nations Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE 82), held at Vienna in 1982, made a series of recommendations relating to studies which were subsequently endorsed by the General Assembly.[39] These studies were assigned to the Scientific and Technical (S&T) Sub-Committee and the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space (COPUOS).[40] The S&T Sub-Committee established a Group of Experts which has produced a Draft Final Study on The Feasibility of Obtaining Closer Spacing of Satellites in the Geostationary Orbit.[41] The Legal Sub-Committee established a Working Group that prepared some draft principles relating to "the rational and equitable use of the geostationary orbit."[42] However, numerous divergent views on the appropriateness of these principles, both procedurally and substantively were expressed in the Sub-Committee and the Committee.

48. The Study of the S&T Sub-Committee on closer satellite spacing is directly relevant to the work of WARC-ORB(1).[43] It not only contains a useful compilation of information concerning the attributes and use of the GSO, but also reaches several significant conclusions. It finds that closer spacing of satellites in the GSO is feasible and that the efficiency of use of the orbit is expected to thereby increase noticeably with widespread implementation of this technique. The Study also finds that, under the present coordination procedures of the ITU, although there have been some cases in which countries have had difficulties adapting their proposed satellites to existing assignments, no country has been denied access to the GSO for any satellite.

49. INTELSAT. The International Telecommunications Satellite Organization (INTELSAT) is one of the largest operators of satellite radiocommunication networks in the world, providing a wide range of services for both international and domestic applications. INTELSAT and its participating parties and signatories have a significant interest in Space WARC developments that the INTELSAT staff articulated in a recent document to all Parties and Signatories.[44] Such concerns have been taken into

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[39] *See* U.N. General Assembly Res. 37/90 (1983) and Res. 38/80 (1984).

[40] *See* Report of the Committee on the Peaceful Uses of Outer Space, U.N.G.A. Doc. No. 20(A/39/20)(1984).

[41] *See* Doc. A/AC.105/340 (25 Oct 1984).

[42] *See* Annex II, Report of the Legal Sub-Committee, Doc. A/AC.105/337 (1984).

[43] The study was prepared by experts from Columbia, Czechoslovakia, Italy, Japan, Kenya, Pakistan, Sweden, USSR and the United Kingdom, with assistance from ITU staff.

[44] *See* WARC-ORB(1)/88, Issues of Concern to Intelsat, attachment to memorandum to all signatories to the INTELSAT Operating Agreement from the Director General, Ref.: S/84-34 (18 Oct 1984).

account in the preparation of our proposals. While our reliance on INTELSAT facilities for international communication services is significant, they are not exclusive. They must be viewed in the context of the multiplicity of communication facilities on which this country's domestic and international telecommunication industry depends. We believe that the views expressed below adequately balances those interests.

50. CITEL. The Inter-American Telecommunications Conference (CITEL) is an organ of the Organization of American States (OAS), and serves to bring most of the nations of the Western Hemisphere together to exchange views and reach agreement on important telecommunication issues. Its Permanent Technical Committee III (Radiocommunications) has a mandate to focus on Space WARC. It met at Buenos Aires 19-23 November 1984, reached agreement on several WARC-ORB(1) matters, but postponed the more difficult issues to the next meeting in March 1985.[45]

51. OTHERS. In addition to the above organizations, others with highly specialized interests have been involved in Space WARC preparations. For example, in 1980 the Joint Civil Military (JCM) Meeting of the Allied Radio Frequency Agency (ARFA) of the North Atlantic Treaty Organization (NATO) established a Joint Working Party on WARC-ORB(1) to focus on several matters of particular interest to NATO. In addition, others such as the International Maritime Satellite Organization (INMARSAT), the International Maritime Organization (IMO), the International Civil Aviation Organization (ICAO) and the World Meteorological Organization (WMO) have undertaken activities that have a bearing on the Space WARC.

Part III. Major Issues

52. At the outset, we emphasize the intention of the Commission and, we believe the United States, to reach an agreement on these issues in a cooperative manner with *all* countries. We remain open to a wide range of options that bring about "equitable access in practice" for all. This has been the primary thrust of our entire preparatory effort; it remains so now.

53. However, we also emphasize that any new or modified arrangements fashioned by the Conference must support U.S. telecommunication requirements, be compatible with our pro-competitive deregulatory policies, encourage efficient use of the orbit/spectrum resource, and not be unnecessarily burdensome or inflexible in allowing innovative services to

[45] *See* Draft Final Report, Organization of American States, Inter-American Telecommunications Conference, First Meeting of the Permanent Technical Committee III: Radio Communications of CITEL, 19-23 November 1984, Buenos Aires, Argentina, OEA/SER.L/XII, PCT.III-30/84 (23 November 1984).

be introduced. Although this Conference has been sometimes portrayed as a conflict between developed and developing countries, we believe that pragmatic objectives will guide the work of the Conference. We believe a proper balance will be found between protecting existing systems in which significant investments have already been made with the necessity of assuring that future systems, that may not yet be fully defined and funded, will in fact be accommodated when they are ready to be placed into service. Similarly, we believe a practical solution can be found to any potential conflict that might be perceived between the technology needed to maximize access to the orbit and the ability of countries to rely on their own industries to implement future satellite systems to satisfy their national requirements.

54. These interests were plainly evident during the course of the many discussions at the CPM. With a continuing focus on these common interests, there is no reason to believe that the first session next August will not conclude in a manner acceptable to every nation.

55. This *First Report* and *Order* presents what appear to be the key Conference issues. We have attempted to portray the range of views and options on these issues and, to the extent possible at this time, pragmatic courses of action.

A. To "Guarantee in Practice, Equitable Access" for the Satellite Networks of All Countries

56. Background. The basic goal of the Space WARC is "to guarantee in practice for all countries equitable access to the geostationary-satellite orbit and the frequency bands allocated to space services."[46] In the *Fourth Notice,* we indicated that equity is intrinsically an abstract concept that can only be achieved on a case-by-case basis. Its pursuit necessarily must rely on an international system of cooperation that in the *Third Notice* we characterized as the appropriate mechanisms that give everyone assurance that their needs will be met as they arise.[47]

57. The subject of equity indirectly arose at the Conference Preparatory Meeting during discussions on the ability of various planning methods to provide equitable access.[48] It was one of the few subjects on which a consensus could not be achieved, resulting in the introduction of statements by several Administrations that the planning methods at the extremes did not provide equitable access.[49]

58. Comments on the *Fourth Notice*. A number of comments addressed and emphasized this issue. All the parties recognized the

[46] Resolution No. 3, The World Administrative Radio Conference (Geneva, 1979).

[47] *See Fourth Notice, supra,* at 410, para. 20.

[48] *See* Annex 4, Section 4.4, *CPM Report.*

[49] *See* footnote 24, above.

importance and relevance of equitability. There was divergence, however, as to the ability of anyone to *a priori* define it. For example, COMSAT and GTE suggested that equitability was a key element in these proceedings. It was relevant not only in terms of the *share* of the resource to which an Administration would be entitled, but also in terms of the *effort* an Administration has to make in order to utilize its share.[50] GTE, in particular, believed that the attempt to answer the equity question in concrete terms must occupy the center of U.S. preparations for WARC-ORB(1).[51]

59. On the other hand, AT&T saw the matter in less absolute terms, placing the emphasis instead on "reasonable assurance" in the context of other factors. It argued that a level of reasonable assurance of equitable access *plus* the prospect of unshackled technological development which may obviate the problem altogether (or substantially reduce its severity), was a better "deal" for all concerned than a technologically-restrictive *a priori* planned guarantee.[52]

60. Finding. We agree that a practical system of assuring equitable access to the orbit may lack the simplicity of the plans that have been adopted at ITU Conferences for broadcasting services. However, the Fixed-Satellite Service is far more heterogeneous and dynamic than the broadcasting services. The investment needed to place a communications satellite system into service is large and warrants the efforts of all Administrations to develop reasonable approaches at the Conference. In particular, a planning approach that protects hypothetical systems in the future at the expense of real systems in the present is not equitable in our view. Nor is a planning approach which artificially limits the number of accesses to the orbit below that which would be feasible in the future when the demand for more intensive use arises.

61. All the commentors and our Space WARC Advisory Committee have emphasized the necessity for the Conference to fashion ITU arrangements that bring the affected Administrations together in relatively local forums to achieve equitable entry for new satellite systems *as well as* equitable alterations to the operation of existing systems. This is an extraordinarily complex task, and it is implicit that an equitable result is only likely to obtain on a case-by-case basis.

62. As many nations have already observed with respect to the 1977 Broadcasting-Satellite Plan, merely making a few technical assumptions and parceling out frequency channels, orbital positions, and coverage areas may achieve some immediate satisfaction. But, if the plan is no longer viable in five years because the technology or operational

[50] *See COMSAT Comments* at 5.

[51] *See GTE Reply Comments* at 6.

[52] *See AT&T Comments* at 3.

requirements have changed, the ultimate result is anything but equitable. To define for the distant future precisely what is equitable and what is not, is a process leading to an illusory goal. We believe that the emphasis should be on constructing a planning approach that gives each Administration the access it desires at the time it is ready to implement a system. Anything less is not equitable access.

B. The Factors Considered as Part of the Situation Prevailing

63. Background and Comments. This issue is the initial item on the first session agenda. It was extensively considered in the context of the *Third Notice, Fourth Notice*, and the United States submissions to the CPM.[53] At the Conference Preparatory Meeting, there was a near consensus on this subject.[54] No party filing comments on the *Fourth Notice* addressed this issue, and the second report of the Space WARC Advisory Committee contains no explicit information on this agenda item.[55] The IFRB Report, although conveying some problems of the Board in interpreting and applying the existing arrangements, as well as some general statements by Administrations, does reveal significant new material. To the extent there is any particular conclusion that can be reached from the IFRB Report, it is that the existing arrangements have worked reasonably well.

64. Finding. We believe that Chapter 3 and Annex 3 of the CPM Report to WARC-ORB(1) can serve as a basis for dialogue and agreement by the Conference. We have therefore recommended in our initial proposals that this material be used as a basis for the work of the Conference, with particular attention being given to the conclusions of Chapter 3 of CPM Report:

- "The situation prevailing involves a complex mix of technological, operational, and economic and international and domestic factors."
- "Technological advancements at every level of telecommunication and information systems, from small components to large facilities to entire networks, are occurring at a significant rate."
- "Operational configurations, uses, and infrastructure developments are changing at a significant rate."

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[53] *See Third Notice, supra,* at 6-11, paras. 13-27; *Fourth Notice, supra,* at 405, para. 7; U.S.A., Technical and operational information concerning principles, criteria and technical parameters characterising the prevailing situation in the space services, CPM Doc. No. B/022 (Mar 1984).

[54] *See CPM Report,* Part I at 9-17.

[55] *See* Second Report of the Advisory Committee for the ITU World Administrative Radio Conference on the Use of the Geostationary-Satellite Orbit and the Planning of the Space Services Utilizing It, January 1985. Although the Advisory Committee Bands and Services Working Group did address the subject, their material summarizes existing material. *See* Materials of the Working Group on Bands and Services (15 Dec 1984) at 4-10.

- "In some portions of the 4, 6, 11, 12, and 14 GHz bands and some arcs of the GSO, there exists a relatively intensive use of satellites operating in the Fixed-Satellite Service."
- "Most space services, other than the fixed-satellite, broadcasting-satellite and the mobile-satellite services, make little use of the GSO. Access to the GSO by Administrations is not likely to be a problem for these services."
- "Some services that make limited use of the GSO are successfully organized by specialized user communities such as the World Meteorological Organization. Access to the GSO by Administrations is not likely to be a problem for these services."

65. In considering the prevailing situation, it should be noted that many of the techniques necessary to satisfy the world's satellite communications requirements have been implemented in some of the networks serving the U.S. These include capacities on the order of 3000-6000 voice channels per transponder using compandored FDM-FM or SSB-AM, spacecraft antenna beam shaping, domestic use of spot beams, and reductions to 2° in orbital spacings between domestic satellites in the 6/4 GHz and 14/12 GHz bands. We believe that increased use of these and other techniques will be necessary to accommodate the requirements of the 1990s and beyond.

66. Based on our careful review and analysis of the CPM material, we also believe that the work of the Conference should be based on the following additional observations and conclusions concerning the prevailing situation:

- All countries have been able to exercise equal rights to satisfy their telecommunication requirements, using satellite technology, and have employed different means and approaches to satisfy their requirements;
- The existing ITU arrangements, in particular the provisions governing the actions of Administrations and the IFRB, have proven to be very successful in affording Administrations access to the GSO/spectrum.
- A wide variety of space services has in fact developed in response to changing requirements;
- Satellite communications through common user systems has represented a cost-effective arrangement for many countries, both as an interim system leading to an independent domestic system and as a continuing arrangement for those developing countries that otherwise may not be able to afford satellite service or whose telecommunication needs are so limited as to make independent satellite services not cost-effective;
- Improvements in technology have been able to satisfy growing demands for orbit capacity and access at reduced unit cost;
- As the needs of individual countries dictate, common user systems have increasingly been used in conjunction with networks of individual countries;
- The value of introducing new technology and more efficient spectrum and orbit management techniques has been widely recognized and their implementation has proven to be feasible;

- Substantial demand for service in the FSS has led the USA to prescribe a maximum orbital spacing of between adjacent USA satellites which users must be prepared to accept. It has been found that this approach is both economically and operationally viable and conducive to achieving a high orbit utilization efficiency.

C. The Satellite Services and Bands Subject to Any New Planning Approach

67. Background. This subject was also extensively considered in the context of the *Third Notice, Fourth Notice*, and the United States submissions to the CPM.[56] Similarly, at the Conference Preparatory Meeting, there was a general consensus on this subject. The CPM Report states as a conclusion:

> So far there is only one FSS band pair for which the utilization intensity can be regarded as relatively high, 6/4 GHz, and this intense use is largely confined to certain portions of the GSO providing service to certain geographic areas. The only other band in which the intensity can be expected to approach that of 6/4 GHz is at 14/11-12 GHz, although at those frequencies the intensity is expected to rise gradually.[57]

68. Comments on the *Fourth Notice*. Nearly every party filing comments on the *Fourth Notice* expressed their views on this agenda item. The positions ranged from planning a precisely defined band pair, the Fixed-Satellite Service bandwidths of 3700-4200 MHz and 5925-6425 MHz,[58] to more general band pair reference,[59] to a strong preference for one band pair, almost foreclosing another,[60] to maintaining some flexibility.[61] In addition, AT&T noted that traffic demands may vary considerably between various orbital positions, and urged that these *geographical* differences be examined in detail in formulating the United States position, as a further mechanism of narrowing the focus of any alternative planning.[62]

69. Space WARC Advisory Committee Views. During the second round of Space WARC Advisory Committee work in late 1984, this subject was considered by a special working group.[63] The Advisory Committee believed that the record of satellite system development and operations over the last two decades logically pointed to the 3700-4200 MHz and the

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[56] *See Third Notice, supra*, at 13, paras. 31-33; *Fourth Notice, supra*, at 408-10, paras. 13-19; U.S.A., Technical and operational factors which may assist the WARC-ORB(1) in its consideration of Agenda items 2.2 and 2.5, CPM Doc. No. B/023.

[57] *CPM Report*, Part I at 22.

[58] *See HBO Comments* at 2.

[59] *See SBS Reply Comments* at 1.

[60] *See SBS Comments* at 2-3, 4.

[61] *See AT&T Comments* at 4.

[62] *See AT&T Comments* at 5.

[63] *See* Materials of the Working Group on Bands and Services, *supra*.

5925-6425 MHz bands as the principal candidates for alternative planning arrangements.[64] Its assessment was contingent, however, upon the nature of the planning method to be applied; and "[n]o bands and services [were] recommended for planning if a rigid, a priori plan is being considered."[65] Alternative arrangements for the 14/11-12 GHz bands were excluded because: the intensity of use is low at this time; experience can be gained from planning in the lower band; and allocations are not uniform worldwide, and regional planning would be required.[66]

70. The Advisory Committee also suggested that it may be desirable to include some 6/4 GHz bands for certain thin route applications in certain parts of the world. The Committee indicated a positive need for an ITU allocation to a low technology satellite service to satisfy the needs of developing countries which would require large satellite spacings of perhaps 5 degrees or even more to allow for the use of low performance earth station antennas. The Committee pointed out that significant segments of the electromagnetic spectrum presently allocated to the FSS do not appear to be presently used for this service, and that some small segments of these bands could be designated for a low technology service after taking into account the relevant sharing requirements and constraints imposed by other services.[67]

71. Finding. Nothing that has occurred during the nine months since the *Fourth Notice* has persuaded us that our basic finding in that *Notice* should not be reaffirmed. We continue to believe that this agenda item of the Conference is best approached through the same two-step process that we previously adopted and which was incorporated in the CPM Report.

72. The first step is the establishment of specific decision making criteria. These criteria include: allocation status, operational status, economic impact, specialized user community, technology status, operational characteristics, and GSO utilization intensity.[68] The second step is the application of these criteria to the available facts and planning approach being considered. Based on these criteria, we conclude that only portions of the Fixed-Satellite Service bands between 3700 and 7075 MHz should be considered for any alternative planning approach at this time.

73. With respect to higher frequency bands, we are very concerned about the impact of alternative arrangements on the development of technological and operational innovation. For example, the very complex

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[64] *See* Second Advisory Committee Report, *supra* at 10.

[65] *Id.* at 8.

[66] *See id.* at 10.

[67] *See Ibid.*

[68] An additional criterion, requirements status, was added at the CPM. *See* CPM Report, *supra*, Part I at 19. It can, however, be included under the other criteria and we see no purpose in discussing it further here.

mixture of allocations and restrictions in the 14/11-12 GHz bands, that vary among the different regions of the world, would seem to require the use of the existing ITU arrangements.[69] It is also worth emphasizing an additional point made by our Space WARC Advisory Committee that experience should be gained applying alternative arrangements at 6/4 GHz before proceeding to apply them at 14/11-12 GHz. We therefore believe that frequency bands above 7075 MHz should not be considered. Our recommended proposals reflect this finding.

74. Low technology satellite service is an important concern of many developing countries. However, the issue is not primarily one of low technology spectrum allocations, but rather the provision of a particular application, i.e., thin route transmissions to widely dispersed populations. It is a subject sure to receive considerable attention at the Conference, but one which is not incompatible with the approaches we suggest below. Thin route applications have been provided already in the U.S. domestic environment to remote regions such as Alaska, demonstrating that a diversity of applications can coexist under the current regulatory arrangements. Of course, in the most intensively used bands, Administrations may not be willing to accept the operating constraints[70] that might be required of low technology applications to achieve compatibility with high density links under conditions of small satellite separations. Such services should not, however, be a controlling factor in limiting future access to bands that are or will be used for high capacity satellite systems. Instead, we believe that such diverse applications should be accommodated within other existing allocations or by making use of reverse band operation.

D. The Principles Underlying Any Planning Approach

75. Background. Since the first international attempts at "planning" the use of radio stations in 1920, the discussion of associated principles seems to have been a prominent part of the activity[71] True to this tradition, the WARC-79 resolution calling for the Space WARC required the first session to " . . . establish the principles . . . for planning."[72] In the *Second Notice*, we addressed this subject and listed numerous principles.[73] Many of these were included in the United States contributions to

[69] *Cf. ibid.*

[70] For example, such constraints might include careful selection and coordination of r.f. carrier frequency assignments, increased inter-satellite interference allowances, reduced total transponder capacity. They do not, however, necessarily preclude such low technology services in intensively used bands or require large satellite separations.

[71] *See* Universal Electrical Communications Union, Draft Convention and Regulations (1920) at p. 89.

[72] Resolution No. 3, *supra*.

[73] *See Second Notice, supra*, at 8-17, paras. 19-41, Appendix C, Part II.

both the February 1984 Meeting of CCIR IWP 4/1 and the CPM.[74]

76. Only one other Administration submitted extensive views on the subject of principles for the CPM.[75] We noted at the outset of our discussion of Conference issues that there exist certain pragmatic interests shared by all nations. At the CPM, we worked with developing countries to incorporate these interests in a set of general principles on which there could be substantial unanimity. The Annex 4 of the CPM Report lists these principles:

- to guarantee, in practice, for all countries, equitable access,
- to achieve the most efficient and economical utilization of the orbit/spectrum resource,
- use of applicable advanced technology and operational techniques to the extent possible,
- use of uniform technical parameters and technical criteria for satellite systems, as far as possible,
- good adaptability to the features of various kinds of requirements and to the needs of technological development and new services.[76]

77. Comments on the Fourth Notice. The parties offered few comments on principles. This probably occurred because of our *Second Notice* findings on the subject, and a view that there was little more to be said. However, COMSAT did include in its comments a principle not previously articulated, namely the reduction of administrative burdens imposed on Administrations.[77]

78. Views of the Space WARC Advisory Committee. The Space WARC Advisory Committee established a special working group to prepare a very comprehensive set of principles.[78] They divided the subject into four dominant categories: Equitable Access to the GSO and Frequency Spectrum for Space Services; Extent of Rights to the GSO and Radio Frequency Spectrum and Rights of Other Systems; Elements of Planning Methods; and Observance of Rights of Other Services. Within each of these categories, specific principles relevant to any planning method were set forth.

79. Finding. We believe the work of the Advisory Committee in developing a comprehensive set of principles and their underlying rationale has been useful. The substance of these principles is consistent with those we presented in the *Second Notice*, as well as those formulated by the international community at the CPM. We believe the

[74] *See* U.S.A., Contribution Related to Planning Principles, Doc. IWP 4/1/1112 (Feb 1984).

[75] *See* China, Contribution Relating to Principles, CPM Doc. No. B/043.

[76] Annex 4, Section 4.3, *CPM Report*.

[77] *See COMSAT Comments* at 11.

[78] *See* Principles for Planning and Guidelines for Regulatory Procedures for WARC-ORB(1), Doc. PL-P-16 (30 Nov 1984).

statement of principles in our recommended proposals in Appendix B reflect those recommendations as well as the views expressed by other government agencies and other countries in the course of our preliminary discussions with them.

E. The Kind of Planning Approaches That Should Be Considered by the Conference

80. Background. The consideration of a planning approach is clearly the central issue of the Conference. It is also the most complex issue, and the one most entwined with national policies and strategies.

81. We addressed this subject in both the *Third* and *Fourth Notices.* First, we reviewed the historical record of international "planning" to avoid harmful interference between radio stations, noting the methods employed and the radio services affected. The most significant observation was that only very homogeneous and non-dynamic services — largely broadcasting services — have been subject to planning.[79] We also noted that "planning" encompassed a broad range of activities, including for example, network planning undertaken during the past few decades by telecommunication system operators.[80] Second, we sought to articulate a "common underlying framework" for all planning approaches.[81] Third, we presented several key questions common to all planning approaches in an attempt to assess the implications of various alternatives.[82] Our only finding on this subject was that the use of Administrative Radio Conferences to adopt very long-range, detailed, and inflexible plans, was not an acceptable planning approach.[83]

82. The general approach taken in these notices received substantial domestic and international support. However, the international community and developing countries in particular were initially reluctant at the CPM to accept the premise that all methods, including the existing one, could be subject to a common analytic framework. Ultimately, however, each of the planning approaches receiving attention at the CPM was articulated in three phases: identification, harmonization and implementation.[84]

83. However, a wide range of views were expressed by parties filing comments on the *Fourth Notice.* For example, AT&T noted that the Commission's proposal of a conceptual framework for a dialogue on alternative ITU arrangements, based on the stages of identification, harmonization and implementation of satellite systems, could be a useful

[79] *See Third Notice, supra*, at 14, para. 36; *Fourth Notice, supra*, at 414-15, para. 30.
[80] *See Fourth Notice, supra*, at 415, para. 31.
[81] *See Id.* at 410-12, paras. 20-25.
[82] *See Id.* at 412-24, paras. 26-51, especially at para. 52.
[83] *See Third Notice, supra*, at para 37-38.
[84] *See* Annex 4, Section 4.3, *CPM Report, supra*, Part II.

tool for developing more substantive approaches to orbit resource management.[85] GTE, COMSAT, and SBS, however, suggested that the identification and harmonization phases are becoming increasingly intertwined and reliance on such a distinction may be counterproductive.[86]

84. The intent of our common underlying framework concept was to provide a bridge to a common ground for bringing together those with divergent views at the CPM, for placing all planning approaches on the same analytical plane, and for encouraging a dialogue on issues rather than on a handful of numbered methods. We believe it was useful in accomplishing these goals and may enjoy some continued utility. As a practical matter, however, the time has come to focus directly on key questions rather than on frameworks.

85. Finding. Whenever the subject of "planning" satellites has arisen during the past eight years, it has frequently induced polarized views. There has been a tendency to view this subject using models at the extremes: the status quo versus a rigid, long-range plans based on artificial requirements; a *posteriori* versus a *priori*; etc. However, models at the polar extremes are not useful in achieving a consensus among people with diverse views.[87] Indeed, they may distract attention from the central objective: assuring equitable access in practice . . . and efficient use of orbit/spectrum.

86. There are numerous different possible planning approaches. As we indicated in the *Fourth Notice*, it doesn't seem useful to attempt to describe all these various approaches and compare them against each other. This is fully consonant with the conclusions of our Space WARC Advisory Committee which believed that there are numerous approaches for regulating the disposition of the orbital resource that are acceptable to the United States. These can be developed by utilizing the building block approach. The key is to develop creative ways to insure access to the GSO resource by all Administrations and at the same time retain flexibility in the development of satellite networks.[88]

87. The various planning methods that have been, and will be discussed, are merely mechanisms to achieve this end; not ends in

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[85] *See AT&T Comments* at 6-7.

[86] *See SBS Reply Comments* at 2, *GTE Reply Comments* at 4; *COMSAT Comments* at 8-10.

[87] For example, the comments on the *Fourth Notice* make it clear that few really expect that the existing arrangements will continue to find acceptance in bands experiencing very intensive use. At the other extreme, we know of no Administration who has formally proposed the application of a long-range, rigid planning approach in the bands which are now intensively used. Similarly, a *priori* or a *posteriori* are very qualitative, relative characteristics, and no approach can be meaningfully described wholly in these terms.

[88] *See* Report of SWAC, Planning-Methods, Doc. No. PLM-15 at 10 (15 Dec. 1984).

themselves. We believe it is imperative to refocus the dialogue upon our common goal, rather than conflicting mechanisms, to do this through an open and candid discussion of some core issues, and begin the process of developing consensus upon them.

88. The Key Questions. There are many important issues associated with this subject. However, after the nearly five years this proceeding has been active, several of them seem most important: devising a planning approach that provides adequate protection for existing systems and a reasonable guarantee of accommodation for new systems; devising the technical and operational criteria for controlling interference among systems; selecting the institutional attributes of the planning approach(es); minimizing unrealistic requirements; and the appropriateness of setting a planning period length. We realize there are other ways of stating these issues, and that they are all intertwined and cannot be entirely isolated from each other.[89] Nonetheless, we will use this statement of our dominant concerns in organizing the discussion that follows.

1. Devising a Planning Approach That Provides Adequate Protection From Interference for Existing Systems and a Reasonable Guarantee of Accommodation for New Systems.

89. Background. It is well recognized that the environment for fixed-satellite networks is highly dynamic and heterogeneous. At some point, Administrations, international organizations and private operators consider that entire environment, make a number of decisions, and commit very large capital resources to implement their satellite systems. The ITU arrangements at issue in this Conference exist to afford reasonable protection from harmful interference for that investment. That measure of protection is at least as important to developing countries as to more affluent countries.

90. However, this protection cannot be absolute because the environment is dynamic. The technology, operational requirements, and available facilities continue to change, and most notably, new satellite systems must be accommodated. This frames the first, and perhaps the foremost

[89] For example, we note that our Space WARC Advisory Committee, in conjunction with their conclusion that there are numerous approaches that may be acceptable, similarly focussed on some common characteristics of planning methods: "accommodate all existing and foreseen requirements; provide for continued satellite network technological development; provide for efficient use of the orbital resource; insure that all Administrations have access to the geostationary resource when the need arises; [and] simplify the existing Radio Regulations so that they are easy to understand and implement. Any planning approach that furthers all of these goals should be acceptable to the United States." *Ibid*.

issue: what constitutes adequate protection for existing systems and a reasonable guarantee of accommodation for new systems.

91. Comments on the Fourth Notice. In the comments filed in our Space WARC inquiry, the maintenance of adequate protection of existing systems was repeatedly mentioned and emphasized. For example, AT&T urged that before satellite implementation, the satellite operator must be aware of what protection will be afforded, in order that required performance levels can be maintained. Without this protection, AT&T noted, satellite operators could not guarantee reliable economical services to their customers. Service performance should not be decreased to unacceptable levels as more satellites are placed in orbit, and the amount of possible degradation at the end of the satellite's life should be known to the operator *before* the satellite is ordered, manufactured and launched. If service performance can be reduced in response to political pressures to unacceptable levels, the ultimate result can only be the demise of the satellite service. AT&T urged the Commission to ensure that any potential increases in interference due to additional satellites in orbit should first be overcome by improved technology. AT&T also urged that aggregate degradation over the satellite service life, if permitted at all, should be limited to a pre-set amount in order to assure satellite operators stability in their long-term planning.[90]

92. Other comments were more general, urging protection for the life of the system, but not stating the *levels and associated periods of protection.* For example, GTE and MMCS urged that protection should correspond to the life of the system rather than to predetermined limits set by planning conferences.[91] COMSAT expressed this concern in considerable detail, maintaining that the matter of an assignment lifetime should be resolved on the basis of need rather than through any time mechanism. It argues that the involuntary discontinuation of an assignment should be made on the basis of need, merit, and an exhaustion of other options. The issue should not arise until an access seeker was, after consideration of all possibilities, denied a useful assignment. Nothing was gained by the setting of an entirely arbitrary expected network lifetime. Existing systems need to be preserved and protected to the maximum extent possible. The continued integrity of an existing system was paramount, according to COMSAT, because it is the very characteristic which an access seeker attempted to secure for its system.[92]

93. We similarly believe that a system should be afforded substantial interference protection for its lifetime rather than some arbitrary time limit or requirement. Our interests are the same as any other country.

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[90] *See AT&T Comments* at 12.

[91] *See GTE Comments* at 7; *MMCS Comments* at 5.

[92] *See COMSAT Comments* at 21-22.

Once a system becomes operational under a particular assignment, it must be provided interference protection. The difficulty in implementing this principle, however, revolves around the "*nature of the international protection*," over time.[93] Comments on this subject addressed both maximum aggregate limits on packing and on repositioning.

94. Lifetime Maximum Aggregate Packing Limits. AT&T described some potentially useful means of resolving one aspect of this issue. To achieve an absolute aggregate lifetime limitation on interference, AT&T urged the Commission to consider a fixed upper limit on satellite system packing density for systems having first order interference effects, such as systems serving common adjacent or nearby areas. At some level of planning, there might be established some maximum level of packing or acceptable interference beyond which further efforts at harmonization would cease, in order to assure existing satellites that no further service degradation would occur. Such limits might be set as guidelines and changed as frequently as warranted by technological advances. The maximum packing level for any frequency and service should be determined economically — through comparison with the next most economically attractive and available frequency band, giving due consideration to the recommended limits of permissible interference to other services with equal sharing rights.[94]

95. Lifetime Maximum Repositioning Limits. AT&T also commented on repositioning, noting that they were concerned that certain proposals appear to require an unacceptable measure of repositioning. Certain proposals have the potential of requiring operating systems to readjust their satellite position every time a new satellite is placed in orbit. AT&T recognized the potential need for some satellite repositioning during its operational life, and suggested that it would be entirely unacceptable in terms of cost and service interruption to be required to move more than once or twice during the lifetime of the satellite.[95]

96. COMSAT suggested that relocation of existing networks' satellites should only be considered a measure of last resort. COMSAT urged that if relocations were necessary, they should not be significant, perhaps a few degrees of arc at most. In addition, if an Administration had relocated one of its satellites, it should be exempt from relocating it for a specified period thereafter. Of course, a system designer might wish to incorporate a substantial relocation capability, particularly if there were a requirement for intrasystem satellite exchange or replacement, or if an orbit location were used in an arc segment in which another Administra-

[93] *See* Fourth Notice, supra, at 424, para. 52.

[94] *See AT&T Comments* at 12.

[95] *See AT&T Comments* at 10-11.

tion has priority status.[96]

97. Finding. We indicated in Part III.A, above, that the emphasis should be on constructing a planning approach that gives each Administration the access it desires at the time it is ready to implement a system. Anything less is not equitable access. Thus, the nature and length of the protection for existing systems must be variable to accommodate new entrants when they are ready to implement a system. However, operational systems have a limited ability to accommodate additional interference or effect repositioning of satellites. During the expected lifetime of the satellite, a significant level of protection must be afforded. However, this is complicated by many technical and operational criteria that vary among different systems. It is a subject in which all nations have a considerable stake. As more and more developing nations commit their precious financial resources to their own satellite systems, this balance between protection and access must be defined more precisely to reduce uncertainty in planning by both existing satellite system operators and those countries planning their initial satellite systems.

98. Normal replacement satellites, on the other hand, would not necessarily be protected to the same degree. Replacement satellites should incorporate appropriate improvements in the technology that will inevitably have arisen since the original satellite was first designed, and accept additional interference necessary to accommodate later satellite systems. It is most important to take measures that continue to increase the overall capacity of orbit. Any acceptable planning approach must allow consideration of these important and complex matters in an incremental and timely manner. In particular, we believe that it should be recognized that adjustments to systems can generally be made with lesser impact on continuity of service at the time of normal satellite replacement than at arbitrary times during the operating lifetime of the satellite.

2. Devising the Technical and Operational Criteria for Minimizing Interference Among Systems.

99. Closely entwined with the first issue is the matter of criteria for detecting potential interference between systems and adjusting the operating parameters of those systems to achieve some acceptable level of interference. Both COMSAT and SBS viewed this matter as an overriding question, and urged that careful attention be given to the matter so that reasonably identified new satellite systems are accommodated to the maximum extent practicable, even when a conflict arises.[97]

100. There are many technical and operational criteria and techniques that are directed toward accomplishing this. We made specific reference

[96] *See COMSAT Comments* at 19-20, 26.

[97] *See COMSAT Comments* at 8; SBS Comments at 5.

to several of them in the *Fourth Notice* and solicited comments.[98] These include, for example: the French M-3 harmonization technique; the Japanese Orbit II and CAP-N computer programs; the arc segmentation technique;[99] and our domestic approach of requiring closer spacing between satellites. We also solicited comment on whether networks enjoying particular technical or operational characteristics, such as common-user systems, should as a matter of principle enjoy any advantages in applying these criteria.[100] Each of these subjects are separately considered below.

101. Comments on the M-3 Harmonization Technique. Both COMSAT and SBS saw utility in certain features of M-3 harmonization, but cautioned against use of the entire technique. COMSAT pointed out that the French "M-3" approach consists of (1) segregation, in frequency; of the most incompatible (inhomogeneous) transmissions through a *priori* frequency segmentation; (2) determination of a new assignment's orbital "service arc" as part of a multilateral coordination procedure; and (3) distribution of the thus introduced primary and consequential secondary interference among the new and the existing networks through satellite relocation of the latter, the magnitude of such interference to be determined by the "delta-T-star" method. COMSAT noted that such an *a priori* band segmentation technique, while capable of reducing coordination problems, would be overly restrictive in light of sophisticated architectures now under consideration for some networks and likely to be considered for others in the future. COMSAT stated that the avoidance of inhomogeneities should be part of the multilateral harmonization process and for these reasons, submitted that support of the "M-3" approach as an indivisible method (so described by the CPM) would not be in the U.S. interest.[101]

102. SBS additionally pointed out that M-3 techniques would all lead to greater potential spectrum/orbit resource utilization, but are only practical for new systems before they are launched and made operational. SBS also noted that the notion of equitable interference is also impractical to implement because very sensitive modulation schemes and weaker signals would require greater protection than channels on neighboring satel-

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[98] *See Fourth Notice, supra*, at 421-21, paras. 42-43.

[99] This approach has been somewhat independently worked on by our Space WARC Advisory Committee, the National Aeronautics and Space Administration (NASA) and the Nippon Telephone and Telegraph Public Corporation (NTT). NTT refers to this approach as Coordination Orbital Arc (COA), and has introduced papers describing it in CCIR. *Cf.* First Report of the Space WARC Advisory Committee; CPM Report, *supra*, Part II at 158.

[100] *Fourth Notice, supra*, at 422, para. 44.

[101] *See COMSAT Reply Comments* at 8-9.

lites.[102]

103. Finding on M-3. M-3 harmonization is a collection of techniques that individually or in some composite aggregation might be useful in resolving interference problems between satellite networks. Some of these techniques are either being used or can be used to resolve interference problems between systems. We will be advocating that they be recognized as an essential element of any planning approach. However, other techniques included with the M-3 concept, such as the delta-T-star method, require further study and evaluation before we could accept their formal inclusion in any planning method.

104. Comments on Computer Models. The subject of computer models elicited a range of views. For example, AT&T indicated that it might be useful if a standard set of hypothetical reference systems were constructed to translate a country's perceived long range needs into a framework of approximated satellite specifications for planning purposes, if no more accurate specifications can be provided. Without such a framework, AT&T argued, only consideration of hardware-specific existing and proposed systems would be possible, and be an impractical limitation for administrations having little technical experience in projecting satellite specifications.[103]

105. In a certain narrow range of application at the regional and subregional levels to identify the optimal operational parameters for proposed networks or the most efficient use of individual locations, GTE believed that models promised to improve coordination continuously as each new system is coordinated with the existing ones.[104] Without being specific, COMSAT suggested that for them, the calculation methodologies introduced by Japan were of utmost importance to the application of our computer based programs.[105]

106. Finding on Computer Models. We regard computer models and subroutines as necessary tools to manage the information associated with any planning approach, and to analyze and control interference levels among systems. *Computers are the tools of any planning approach and not the approach itself.* Any acceptable planning approach must be designed to maximize the opportunity for access to the orbit, and then the necessary computer programs can be developed to promote this objective. We do not believe that any limitations of currently available computer programs should be the basis for excluding any planning approach that would otherwise best achieve this objective.

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[102] *SBS Comments* at 6-7.

[103] *See AT&T Comments* at 9-10.

[104] *See GTE Comments* at 6.

[105] *See COMSAT Comments* at 26-27.

107. Comments on Arc Segmentation Techniques. Although arc segmentation techniques have received considerable attention within one of our Space WARC Advisory Committee working groups, and have been repeatedly advocated by Japanese contributors to CCIR work, only AT&T addressed these techniques in *Fourth Notice* comments. AT&T suggests that this technique could be useful in conflict resolution. It described the concept as using satellite antenna discrimination to allow reuse of the orbit by Administrations with non-overlapping coverage areas. The conflict resolution guidelines might then include general agreements between Administrations with overlapping coverage areas as to which segments of the GSO would be used first by each Administration, so that their respective long-term satellite programs would not initially be competing for the same orbit segments. Other Administrations whose coverage did not overlap would then be able to resolve their difficulties by interleaving or co-locating techniques. If unanticipated conflicts do arise later in this process which cannot be resolved through bilateral discussions, it is likely that multilateral harmonization would resolve the conflict.[106]

108. Our Space WARC Advisory Committee in their recent work referred to this technique as an "approach," and gave it a third order of preference. As described by the Committee, segments of the GSO, as opposed to specific orbit positions, would be made available to Administrations or groups of Administrations. Specific satellite antenna characteristics would be needed to allow reuse of the same orbital arc by more than one administration. This antenna specification could be improved on a regular basis. Allocating arc segments would clearly establish guidelines for the use of the orbit and for the operation of satellite networks to the extent that service areas and ranges of assigned orbital arcs are specified. It is asserted that this technique has clear advantages over any other *a priori* allotment scheme because it provides flexibility within the confines of an assigned orbital arc. The Committee believed that although this technique does not totally alleviate the tension that exists between guaranteed access and flexibility, it was more likely to accommodate this tension than any other identified planning method.[107]

109. On the other hand, during the course of Advisory Committee work, several significant criticisms were noted. For example, where more than one country is involved in a single arc, the technique fails to define how conflicting rights to shared visibility arcs can be resolved. It would require further clarification and specification to demonstrate how it could provide a satisfactory framework for the resolution of a large number of claims from the same sub-zone. In addition, it essentially compartmental-

[106] *See AT&T Comments* at 9.

[107] *See* Report of SWAC, Planning - Methods, *supra*, at 8-9.

izes the problem, but may lead to a widely divergent procedures for obtaining access and coordination of systems in different zones.[108]

110. Finding on Arc Segmentation. The term "arc segmentation" has been used with several different meanings during the course of the Space WARC preparations. One such concept involves grouping satellites together with similar characteristics to reduce inhomogeneity. Another concept is the planning technique discussed above to provide an organized approach to grouping together the requirements of various Administrations to take into account space station antenna discrimination between separated service areas. The Committee itself noted that the latter concept of arc segmentation does not represent an integral ITU arrangement for satellite systems. Rather it is a technique capable of being used in conjunction with other approaches. We find that both concepts of arc segmentation have merit under certain conditions. We do not, however, believe that arc segmentation has been sufficiently studied to warrant its inclusion in our proposals as a planning method at this time. As we have indicated above, the desired objective is to maximize opportunity for access by all nations, not restrict access to predefined arc segments. But we are continuing to consider in greater detail the capabilities of arc segmentation techniques to efficiently aid in the implementation of any planning approach.

111. Comments on the Commission's Closer Spacing Technique. Our request for comment on our own technique to achieve closer spacings and attendant opportunities for access resulted in considerable favorable comment. For example, SBS urged that we develop proposals that rely on the our successful experience over the past decade of accommodating all requested North American satellite system proposals. In other words, the United States' fundamental position should be that the U.S. and its North American neighbors have already devised an acceptable and efficient approach to utilize the visible GSO and any action taken at WARC-ORB(1) should not impinge adversely on that successful exercise.[109]

112. COMSAT considered the principle underlying the Commission's "2° spacing" initiative a highly significant precedent for rational utilization of the GSO. To produce the most desirable result, however, COMSAT believed that the concept should be based on a "minimum assured" rather than a "maximum available" intersatellite spacing. That is, it should be adopted in the form of a formula which includes provisions for certain design and operating parameters, notably satellite antenna characteristics to deal with separate coverage service areas. The formula would, from time to time, be reviewed as standards are upgraded. By and large,

[108] *See* Draft Critique of the Preliminary Conclusions of the Working Groups, Doc. SWAC/PEG (20 Dec 1984), Part III at 2-3; Second Advisory Committee Report, *supra*, at 48.

[109] *See SBS Reply Comments* at 2-3; *GTE Comments* at 6.

systems could choose an intersatellite spacing greater than the minimum assured spacing but would, if necessary, have to accept it.[110] COMSAT further noted that the 2° spacing concept, having high orbit utilization efficiency, was clearly a more restrictive orbit utilization methodology. However, it was an approach that has the virtue of allowing orbit yield to be directly derived from requirements, with the necessary standards or "reference characteristics" as well as the degree to which coordination will be required being outputs rather than ingoing stipulations.[111]

113. Finding on Our Closer Spacing Technique. It is apparent that our domestic spacing technique and successful experience in mutually accommodating planned satellite systems of other Region 2 Administrations are strongly supported as a means of both accommodating newcomers and encouraging more efficient technology. In particular, we believe that our experience with 2° orbital spacings at 6/4 GHz and 14/12 GHz and the underlying technical bases will prove useful in the context of the Conference. Even if this technique does not become an explicit part of any planning approach adopted by the Conference for heavily used bands, such spacings between currently authorized U.S. satellites must be recognized as a fundamental part of our domestic regulatory environment, and current and future commercial satellite requirements.

114. Comments and Finding on "Special Considerations." In addition to soliciting comment on various techniques, we also requested views on "... whether networks enjoying particular technical or operational characteristics should as a matter of principle enjoy any advantages in the harmonization process."[112] In other words, should systems such as those used in common by several Administrations be treated in some special way. Another aspect of this issue concerns networks with severe connectivity or coverage constraints requiring special considerations.

115. Only COMSAT commented on the matter, pointing out the difficulties of effecting such special considerations. COMSAT pointed out that this subject is not easy to address because the bases for such consideration were not easily quantifiable. It suggested that the matter was better handled on a case-by-case basis. We concur with these comments.

3. Selecting the Institutional Attributes of the Planning Approach.

116. The planning process must occur within some kind of institutional framework. A number of views were articulated in response to the *Fourth Notice.* The focus appeared to be on minimizing the administrative burden, and on enhancing the ability of the framework to reach a

[110] *See COMSAT Comments* at 16-18.

[111] *COMSAT Reply Comments* at 7-8.

[112] *Fourth Notice, supra*, at 422, para. 44.

pragmatic, acceptable result. The comments fell into three categories: the nature of the forum, the standing of parties in the forum, and the venue, each of which is separately addressed below.

117. Comments on the Nature of Forum. HBO noted that an acceptable option raised by the *Fourth Notice* was the use of less structured multilateral forums as a means of identifying satellite requirements and harmonizing satellite networks. This contemplated "small, less formal ad hoc multilateral gatherings of administrations." HBO suggested that a forum that has intimate familiarity with both the technical and economic factors associated with satellite services and meets on a continuous basis was more likely to respond to the dynamic and increasingly specialized nature of satellite technology and services. It urged that basic precepts and guidelines be identified as a framework for establishing identification and harmonization responsibilities in a forum other than the IFRB.[113] In the ideal case, according to COMSAT, Administrative Conferences would only have to be held to establish major policies as they affect the preservation of access options. If the periodic upgrading of standards, procedures and constraints could be left to bodies such as the CCIs, the need for convening Administrative Conferences could be drastically reduced and their agenda minimized.[114]

118. Other parties additionally sought to describe the institutional attributes for accomplishing specialized computational and arbitration functions. For example, COMSAT suggested that the manager of some centralized computer capability, presumably a permanent organ of the ITU, should also participate. The manager would also be requested to make some or all of the meeting arrangements and would also be the first evaluator of stated requirements which are submitted. This described essentially an organ similar to the current IFRB, but one with a substantial added burden and the capability to act more visibly and on a more current basis. COMSAT cautioned, however, that such an organ should have no executive or arbitration powers, although its growing knowledge and experience may well lend it an increasing influence.[115] On the other hand, SBS saw a need for some kind of objective third parties to intervene and recommend resolution to a dispute. SBS believed this preferable to use regional or subregional "referees" with some support from the IFRB. SBS counseled that further thought must be given to how this would be accomplished and what binding effect it would have on the interested parties.[116]

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[113] *See HBO Comments* at 6.
[114] *COMSAT Comments* at 13.
[115] *See COMSAT Comments* at 14-15.
[116] *See SBS Comments* at 6.

119. Finding on the Nature of the Forum. We believe that the institutional attributes of the planning process has not received sufficient attention to date. Comments on the Fourth Notice reflect a similar concern. However, it is the institutional forum that will endure after the Conference because it is within this forum that any continuing planning process will have to occur year after year. There is, however, a substantial preference for small, less formal ad hoc multilateral gatherings of affected Administrations which we believe provides the most effective means of providing access to the orbit for new systems and adequate protection for existing systems. By dealing with specific, concrete system requirements and characteristics, such an institutional forum is most likely to produce acceptable and equitable results for all the Administrations involved. Supplementing this preference, the paragraphs below dealing with standing and venue begin to detail some of the important additional attributes.

120. Comments on Standing — Unaffected Administrations and International Organizations. A significant attribute of any forum is the criteria for allowing parties to participate. Traditionally, most forums require as a minimum some real interest in the subject matter. In legal forums, this is referred to as standing. The comments to our *Fourth Notice* addressed both the "interest" criterion (including the two-stop iterative process described in the *Fourth Notice*), and the special problem of common-user organizations.

121. COMSAT stated that the harmonization of a network within its environment should not involve Administrations which are not affected. Interference analysis would yield those Administrations which are affected, and only these should be involved in the harmonization process.[117] If, on the other hand, some countries desire their long-term requirements identified, AT&T supported a two-step iterative process.[118]

122. On the subject of common user institutions, SBS suggested that revisions to the current IFRB procedures should "confer recognition" to institutions such as INTELSAT and others.[119] Similarly, COMSAT stated that it was obvious that common-user systems providing international communications services to users in several or many countries, to the extent that these systems were not wholly owned and operated by one Administration, have a particular need for a direct voice in international proceedings. COMSAT indicated that such systems may also have to be given direct access to international proceedings concerned with the setting of constraints, standards and procedures.[120]

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[117] *See COMSAT Comments* at 14-15.

[118] *See AT&T Comments* at 8.

[119] *See SBS Comments* at 7.

[120] *See COMSAT Comments* at 7.

123. Finding on Standing. COMSAT's comments concerning the exclusion of Administrations having no apparent interest in any particular planning process clearly have merit. Unfortunately, the problem is rather complex. For example, the near-term interests and long-range interests of an Administration may be quite different. This is what led us in the *Fourth Notice* to explore a two-step process that would distinguish between these two kinds of interests. However, such an approach may be overly complex and difficult to apply in practice. Thus, our proposals are intended to encourage planning approaches that focus on guaranteeing access to the GSO for realistic requirements as they arise.

124. SBS and COMSAT suggest that the operators of "common user" satellite systems should enjoy "recognition" or "direct access . . . to proceedings," respectively. It is unclear what SBS means by "recognition." This could mean the conferral of standing akin to that of an Administration at an Administrative Conference. It is doubtful, however, whether the international community would do this. However, we note that operators of common user systems are already granted observer status at ITU meetings and would be expected to continue to participate in any technical meetings to resolve interference problems. With respect to the presentation of requirements for recognition in any planning approach, we expect that the current practice of identifying a notifying Administration for the common user system would be continued.

125. Comments on Venue — Regionalization. Many parties commenting to the *Fourth Notice* strongly urged the use of regional or subregional forums within which to identify/harmonize satellite networks. For example, MMCS urged that the U.S. consider seeking a geographical exception from any worldwide planning system proposed at the WARC-ORB(1) as it would have an adverse effect on the continuing development of the U.S. domestic satellite market.[121] GTE Spacenet indicated a willingness to consider alternative coordination arrangements in which participation was limited to those with a direct interest in the negotiations, i.e., within a regional, subregional, or computer-selected "minimum participation" approach.[122] SBS urged that any alternative ITU arrangement endorsed by the U.S. at the WARC-ORB(1) which differed significantly from the current procedures should be formulated to apply on strictly a regional or subregional basis.[123]

126. On the other hand, COMSAT in its reply comments cautioned against moving in this direction. According to COMSAT, the view of some that Region 2 might go its own way was understandable but parochial and perhaps not in the best interest of the U.S. for several reasons: first, a

[121] *See MMCS Comments* at 6.

[122] *See GTE Reply Comments* at 3-4.

[123] *See SBS Comments* at 2,5; SBS Reply Comments at 1-2,5.

U.S. withdrawal into Region 2 isolation would signal lack of solidarity; second, Pacific and Atlantic orbit locations which are currently considered to lie outside the U.S. "domestic arc" may some day be useful to the United States; and third, the methodology and the access assurance developed in Region 2 may well be acceptable also in other Regions. COMSAT urged that U.S. efforts should therefore be intended for potential global application.[124]

127. COMSAT's Reply Comments amplified on subregioning, pointing out that at the CPM, two flaws of subregioning were identified: the tendency to deny or at least inhibit use of orbit locations by individual administrations and the potential adverse effect on the capacity of the GSO by reducing the number of accesses. COMSAT took the position that both of these concerns are valid and need to be taken into consideration when assessing subregioning as a planning/management technique.[125]

128. Finding on Venue — Regionalization. These views are not necessarily incompatible. Approaches that minimize parties having no contemporary interest in the outcome, and that attempt to resolve conflicts at the regional or sub-regional level, are the most desirable. We believe the best statement on the subject of standing and venue was one contributed by GTE Spacenet.

> The institutional framework for planning approaches should be limited to the regional or sub-regional level, i.e., to those Administrations directly involved within the region. Broader participation necessarily introduces more abstraction into the process and obscures the peculiarities of local geography, characteristics of the current facilities and services in operation, and other regional factors that could not be given the same weight in a global setting.[126]

However, while such an approach is clearly effective in resolving interference conflicts between domestic and sub-regional satellite systems, additional consideration is needed on the question of making any such regional or sub-regional planning results compatible with systems providing international services or with the planning results reached by other regions or sub-regions.

4. Minimizing Speculative Requirements, and the Appropriateness of a Planning Period Length.

129. Comments on Speculative Requirements and Planning Periods. One of the major difficulties long associated with many planning approaches is their tendency to encourage the submission of Administration requirements that have little likelihood of implementation in the near future, or worse yet, based on some purely arbitrary number of

[124] *See COMSAT Reply Comments* at 2-3.
[125] *See COMSAT Reply Comments* at 6.
[126] *GTE Comments* at 4-5.

"allotments" per country.[127] This is closely entwined with an associated issue: should there be a fixed period of time in the future associated with application of the planning approach. In other words, are we looking at systems that will exist during the next three, five, or ten years? As the period of time is shortened, the requirements tend to reflect actual service needs. On the other hand, a point is reached where the period may be so short that the planning process becomes administratively burdensome or fails to serve the needs of the international community.

130. There is a widespread awareness of this problem. The matter involves, however, a delicate balance between national sovereignty and the potential future requirements of other countries. SBS in its comments attempted to describe the difficulties, noting for the "identification" phase, the primary issue was determining whether stated requirements were real and immediate as opposed to speculative and far in the future. SBS suggested a screening process should be devised to monitor this situation, preferably on more of a regional or subregional basis rather than a global one. Those Administrations in neighboring geographical areas could be expected to be most familiar with the traffic requirements of nations close by and are better able to devise arrangements which accommodate the real requirements of Administrations in that region or subregion.[128]

131. SBS suggested the other principal issue in the identification phase was whether requirements were to be identified on a periodic basis, and if so how often. On the one hand, SBS pointed out, the satellite industry was a very dynamic one continually introducing technical improvements which alter the overall environment, thereby outdating previous planning parameters. On the other hand, the economic and operational realities of providing reliable satellite services to the public dictate that equipment and facilities not be replaced until it has been amortized or its useful life has ended. SBS observed that any alternative arrangements must provide a stable, reliable environment for existing systems.[129]

132. AT&T, in addressing the same issue, found some merit in a "two-stage" approach mentioned in our *Fourth Notice* and in U.S. submissions to the CPM. This approach was an attempt to be responsive to the near-term/long-term dichotomy. AT&T stated that the knowledge of requirements for future satellite systems was, in general, quite uncertain in the early stages of planning because of the long lead time required for

[127] For example, the 1977 Broadcasting-Satellite Plan for Regions 1 and 3 arbitrarily allotted a minimum of four or five transmission links to every country irrespective of any requirements. *See* Appendix 30, Radio Regulations (1982).

[128] *See SBS Comments* at 4-5.

[129] *SBS Comments* at 4-5.

implementation of a satellite system. For this reason, AT&T suggested the two-stage iterative approach to the Identification Phase may be a useful technique. Under this approach, the general characteristics of satellite systems which are to be implemented should be identified at an early stage. One possible structure for this first stage, according to AT&T, would be the use of periodic regional (or sub-regional) conferences, where each Administration could generally identify its expected program for the next ten years. Such periodic regional conferences could then determine if any conflicts are expected to arise, and if so, could suggest technical approaches to solving these potential conflicts. The second stage of this iterative identification process described by AT&T would then require detailed specification of satellite characteristics. This specification would be made shortly before the time the system is actually constructed and launched.[130]

133. On the other hand, COMSAT and others, while recognizing this problem, were very reticent to adopt a two-stage approach, or to separate the identification and harmonization functions into distinct phases. As explained by COMSAT, in view of the possibility that requirements could vary between very rudimentary basic statements of need and intent to fairly comprehensive system designs, and accepting an interactive process between identification and harmonization, it may be impractical to establish time windows for the various steps in the pre-implementation accommodation process. COMSAT argues that the identification of new orbital requirements should thus be on a "real-time" basis, without time limitations. The only exception to this, according to COMSAT, would be preservation of the current 5-year limitation between the initial filing and the date at which a system becomes operational. This rule helps to discourage advance reservations which are unrealistic and merely tie up the administrative process. COMSAT indicates that this could be reinforced by the automatic reevaluation of an assignment and a potential consequential reassignment triggered by the need to consider other claims in cases of delayed contract commitments on the part of an assignment holder.[131] Of course, COMSAT's comments largely apply to an ITU regime similar to the current one.

134. Findings on Speculative Requirements and Planning Periods. We find it impossible at this time to indicate if some kind of procedural differentiation is necessary between near-term and long-term requirements. This will depend on the deliberations of the WARC-ORB(1), and the approach to planning that begins to evolve at the Conference. If a definitive boundary extending more than five years in the future were

[130] *See AT&T Comments* at 7-8.

[131] *See COMSAT Comments* at 13-14.

adopted, and if speculative requirements appear likely, the use of a two-stage process to mitigate the potential adverse results may be necessary.

135. Those planning approaches that produce a definitive assignment or allotment plan tend to be oriented around a period of time that determines both the effective period of the plan, and the interval between meetings to amend it. There may be certain administrative and policy reasons for preferring a certain length. However, it is highly important that if such planning approaches are utilized at any level — world, regional, or sub-regional — they must be short enough to be responsive to the dynamic Fixed-Satellite Service environment.

136. At the CPM, a rather generalized planning approach was described in which a planning period of ten years was chosen and justified by a coincidence in some measure with the lifetime of contemporary satellite networks.[132] We do not believe such a long period is appropriate or that satellite lifetimes are necessarily the best criterion of determining this period. As SBS indicated in its comments, the basic fact is that satellite systems are not launched in one batch on some periodic schedule. Clearly, any alternative ITU arrangement must be evolutionary and take into account the concerns and needs of both existing and new satellite operators and customers.[133] In other words, the time at which an Administration will place satellite networks in orbit is unlikely to coincide with specific dates included in ITU "plans."

137. We emphasize: planning forums will always be required to deal with a wide variety of remaining satellite lifetimes, and all satellite networks cannot be treated in precisely the same fashion. Arbitrarily choosing some long planning period will not mitigate this difficulty. Indeed it will exacerbate it. We believe the proper criteria for choosing planning period lengths, if necessary, are considerations such as responsiveness to the dynamic environment and administrative cost. Such lengths may well be different on world, regional, and sub-regional levels, and be tied into mechanisms to progressively encourage more efficient systems. The preferred option is the submission of requirements as they arise, or if any kind of period is used, on an annual basis.

5. General Conclusions on Planning Approaches.

138. Our Space WARC Advisory Committee stated in its Report that "there were numerous approaches for regulating the disposition of the orbital resource that were acceptable to the United States." The Committee said that "these can be developed by utilizing the building block approach; and the key was to develop creative ways to insure access to the resource by all Administrations and at the same time retain flexibility in

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[132] *See* China, Planning method for the establishment of a worldwide plan, *supra.*

[133] *See SBS Comments* at 7.

the development of satellite networks."[134] At the outset of this part of our Report and Order, we indicated our strong concurrence with these views.

139. Notwithstanding these important conclusions, the Committee also included in its Report four specific "planning approaches" that might be used in our proposals.[135] An order of preference was indicated: 1) streamline the existing Radio Regulations; 2) multilateral coordination; 3) orbital arc segmentation; and 4) combined planning.[136] The Committee's Proposal Evaluation Group critiqued these approaches and pointed out that substantive details were lacking.[137]

140. Because many planning approaches are possible and acceptable, it seems more appropriate at this time to further explore the major issues discussed above, and agree on the building blocks of acceptable planning approaches. At this stage in our preparatory efforts and bilateral discussions, it seems premature to encourage nations to champion specific approaches. Because of these important considerations, we decline to include any specific planning approach in these recommended proposals at this time, but rather indicate the specific criteria by which the acceptability of any planning approach can be ascertained. *See* Appendix B, Agenda Item 2.3, Planning Approaches.

Part IV. Other WARC-ORB(1) Issues

141. Devising new arrangements for the Fixed-Satellite Service, although the major activity, is not the only subject under consideration at the Conference. Several other agenda items give rise to other significant issues. These other issues were raised in both the *Third Notice* and the *Fourth Notice*.[138]

A. Incorporation of the 1983 RARC-SAT-R2 Decisions into the Radio Regulations.

142. One of the most significant of these other issues is the incorporation of the decisions of the 1983 Region 2 Administrative Radio Conference for Broadcasting-Satellite Service (RARC-SAT-R2) into the Radio Regulations at the Space WARC first session. In the *Fourth Notice* we reviewed the several comments on this subject and concluded that "... incorporation ... should occur without substantial change."[139] No party filing comments on the *Fourth Notice* addressed this subject.

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[134] Report of SWAC, Planning - Methods, Doc. No. PLM-15 at 10 (15 Dec 1984).

[135] *See* Report of SWAC, Planning - Methods, *supra*, at 5.

[136] *Id.* at 5-9.

[137] *See* Draft Critique of the Preliminary Conclusions of the Working Groups, *supra*, at Part III.

[138] *See Third Notice, supra*, at 17, paras. 44-46; *Fourth Notice, supra*, at 424-25, paras. 53-55.

[139] *Id.* at 425, para. 55.

143. The matter has recently risen to prominence because of an apparent reluctance of some Region 1 and 3 Administrations to incorporate these provisions at the first session, alleging both procedural bars and unresolved technical incompatibility problems. Region 2 Administrations, on the other hand, have resolved to seek such incorporation.[140] Our Space WARC Advisory Committee has extensively reviewed this subject and recommends the United States together with other Region 2 Administrations pursue this matter in bilateral and multilateral meetings prior to the Conference, as well as at the Conference.[141]

144. We endorse efforts to obtain incorporation, and resolve any incompatibilities. Our recommended proposals reflect this finding. *See* Appendix B. The Commission proposes to proceed, in any event, to authorize the construction, launch, and operation of domestic broadcasting satellites that conform with the provisions of the Final Acts of RARC-SAT-R2. The signatories, including the United States, have manifested their intention to act in accordance with the agreed provisions for the conduct of satellite broadcasting in Region 2. While it would be orderly, and is desirable, that WARC-ORB(1) incorporate the 1983 Final Acts into the Radio Regulations, we know of no barrier to our proceeding, as we propose, in conformity with those Final Acts before their incorporation into the Radio Regulations. Due protection must be afforded to recognized services of other Regions irrespective of the time of such incorporation. We therefore consider that there is no cause for concern that the viability of a broadcasting-satellite facility of the United States would depend on anterior incorporation of the Final Acts of RARC-SAT-R2 into the Radio Regulations.

B. ITU Provisions Applying to Non-Planned Bands and Services.

145. One of the Conference agenda items calls for it to improve the ITU arrangements applying to all non-planned bands and services. Several parties filing comments on the *Fourth Notice* both supported such improvement and offered some suggestions.

146. Comments on Provisions for Non-Planned Bands and Services. MMCS suggested that the inadequacies of the present procedures fall generally into three problem areas: a) the availability of the right information at the right time, i.e., the applicability of Appendices 3 and 4; b) the extended amount of time needed for bilateral discussions among multiple Administrations desiring to use the same part of the GSO; and c) the unavailability of information on technical agreements arranged during the coordination process. MMCS supported adoption of these

[140] *See* CITEL, Draft Final Report, *supra*, at 23.

[141] *See* Final Report of the Working Group on BSS Issues (19 Dec 1984).

regulatory reforms by the Conference.[142]

147. COMSAT indicated that three of the undesirable characteristics of the existing regulatory procedures — lengthiness, procedural complexity, and discrimination — could be reduced if not eliminated by adopting a multilateral interactive identification/harmonization process among only affected parties. COMSAT believes that the fourth undesirable characteristic, technical complexity, cannot be eliminated, but it can be alleviated by automation. This may, however, give rise to a new problem: how to formulate international regulations capable of identifying and guiding the conduct of an essentially autonomous ad hoc group of affected administrations or parties involved in any particular multilateral coordination process.[143]

148. Our Space WARC Advisory Committee in their Report also offered some views on this subject. The Committee suggested that the mistrust that existed with the present regime stems from two factors. First, the Regulations were difficult to understand and execute. Second, they contained no provision that explicitly guarantees access to the geostationary resource to all Administrations. The Committee believed that the United States should attempt to alleviate these concerns within the context of the existing regulatory regime by introducing improvements in the procedures that alleviate current shortcomings.[144].

149. Finding on Provisions for Non-Planned Bands and Services. As we have stated above and indicated in our response to the IFRB, the existing ITU arrangements have worked well in dealing with the many complex and dynamic technical, operational and economic factors that bear upon the use of satellite systems, and yet accommodating the requirements of all Administrations. Nevertheless, we accept the views expressed by the commenting parties and the Advisory Committee, and will propose guidelines for improving the current coordination and notification procedures in the Radio Regulations.

150. Several general guidelines are presented in Appendix B as our initial proposals on this subject. We will also carefully review the IFRB Report on the operation of the current procedures and expect to make further proposals as our preparatory efforts proceed. In particular, we expect that these procedures can be substantially streamlined and shortened once an appropriate planning approach and/or alternative regulatory arrangements are decided upon for the bands and services identified in Agenda Item 2.2, above.

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[142] *See MMCS Comments* at 7.

[143] *See COMSAT Reply Comments* at 4-5.

[144] Report of SWAC, Planning — Methods, *supra*, at 6.

C. Other Conference Considerations

151. There are several other agenda items that involve a planning matter of interest largely to other ITU Regions, sound broadcasting by satellite and inter-sessional work. We are not making proposals on either the Region 1 and 3 feeder link planning item nor on the inter-sessional work at this time. On the sound broadcasting by satellite item, we propose that the International Radio Consultative Committee continue studies of sharing options and criteria. *See* Appendix B. In addition, there are several matters that are not clearly within the scope of any particular agenda item, but are likely to be discussed at the Conference. These include reverse band operation, and the removal of inactive satellites, both of which were raised in the *Fourth Notice.*[145]

1. Planning Approaches Based Upon Reverse Band Operation.

152. In the *Fourth Notice*, we indicated that the theoretical capability of bidirectional frequency use to virtually double orbit capacity appears generally unchallenged, although its use is not endorsed for satellite systems operating in this country because of the potential sharing problems with existing space and terrestrial operations. We suggested that it might be useful to demonstrate that the basic potential requirements of all Administrations can be satisfied in this particular pair of bands, using bidirectional transmissions where necessary to satisfy unspecific long-term requirements.[146]

153. Comments on Reverse Band Operation. In the comments, COMSAT and HBO encouraged reverse band operation,[147] and AT&T discouraged such use.[148] Our space WARC Advisory Committee recently indicated that the first session will probably not consider itself empowered to authorize the concurrent use of reversed band operations in, say, the 6/4 GHz FSS band (i.e., 4 GHz uplink, 6 GHz downlink). However, said the Advisory Committee, the U.K. proposal to combine reversed band operations with a *priori* planning could be received favorably, especially by those who have no earth stations operating in the present 6 GHz (up)/4 HGz (down) set of arrangements. The Committee suggested that the U.S. through its consultative process should test the level of interest in this concept.[149]

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[145] *See Fourth Notice, supra,* at 424-25, paras. 53-54.

[146] *See id.* at para. 54.

[147] *See COMSAT Comments* at 23; COMSAT Reply Comments at 11-14; *HBO Comments* at 2,7.

[148] *AT&T Comments* at 15,19.

[149] See Draft Critique of the Preliminary Conclusions of the Working Groups, *supra*, at Part IV.

154. Finding on Reverse Band Operation. We believe that any technique which promises to double orbit capacity should be studied as an option for consideration at the Conference. While we believe that reverse band operations may not be practical in countries with well developed terrestrial and space networks sharing the same bands, this technique may be usable in enough areas throughout the world to permit new satellite systems to be accommodated in the more desirable portions of the spectrum like 6/4 GHz without the degree of technical and operational difficulties that would arise if the conventional directions of transmission were used.

155. The caveats expressed by AT&T are sufficient at this point of our preparatory efforts to warrant caution and further studies. We recognize the concern expressed by the Space WARC Advisory Committee and believe that the long-term impact of this concept needs to be assessed. However, we also believe that the U.S. should be prepared to accept the concept of reverse band operations at the Conference to obtain sufficient orbit and spectrum to satisfy the requirements of all Administrations. If reverse band operations are adopted by the Conference, the consideration of any implementation of this technique within the U.S. must be very carefully evaluated with respect to the impact on any existing or planned terrestrial and space networks in the bands to which this technique is applied.

2. Removal of Inactive Satellites.

156. Comments on Removal of Inactive Satellites. In the *Fourth Notice*, we solicited comment on efforts to remove inactive satellites from GSO. The three commenting parties, SBS, COMSAT, and AT&T supported such efforts. SBS noted that there eventually be a legitimate concern about physical congestion in orbit if expired satellites are allowed to remain in the GSO indefinitely after their useful lifetime. It would seem prudent, said SBS, for satellite operators to reserve sufficient fuel so that satellites can be boosted out of the GSO at the end of their useful lifetime.[150] COMSAT suggested that it was not too early to consider the matter of collision avoidance at WARC-ORB(1), even if only to assess the current severity of the problem.[151] AT&T added that this seemed to be a small price to pay in order to avoid any potential nuisance in the future. AT&T also believed that WARC-ORB(1) is an appropriate forum for the discussion of this issue.[152]

157. Finding on Removal of Inactive Satellites. We note that several satellite carriers have already voluntarily used remaining fuel to boost

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[150] *See SBS Comments* at 8.

[151] *See COMSAT Comments* at 22.

[152] *See AT&T Comments* at 13.

satellites out of the GSO after their useful operating lifetimes had ended. Such voluntary actions should be encouraged. However, we do not believe an adequate record has been compiled to date to justify a formal proposal to the Conference to require sufficient fuel to be reserved for such an end-of-life maneuver. Instead, we currently believe the matter should be studied by the CCIR to provide a comprehensive report and/or recommendation.

V. Administrative Matters

158. Pursuant to Sections 4(i), 303, and 404 of the Communications Act of 1934, as amended, this *First Report and Order* is hereby ADOPTED and it is ORDERED that the *First Report and Order* and the attached recommended *United States of America Proposals* be transmitted to the Department of State. It is further ORDERED that this *First Report and Order* be transmitted to the Head of the United States delegation to the Conference for incorporation into the positions of the delegation.

159. Inquiries regarding this proceeding may be directed to Anthony M. Rutkowski, Office of Science and Technology - (202) 653-8102. Inquiries regarding Appendix B may be directed to Ronald J. Lepkowski, Common Carrier Bureau - (202) 634-1624.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Space WARC Report and Order

COMMENTS FILED IN RESPONSE TO THE FOURTH NOTICE OF INQUIRY

Party	*Comments Filed*
American Telephone and Telegraph Company	15 Jun 1984
GTE Spacenet Corporation	15 Jun 1984
Home Box Office, Inc.	15 Jun 1984
Martin Marietta Communications Systems, Inc.	15 Jun 1984
Satellite Business Systems	15 Jun 1984
	Late Comments Filed
Communications Satellite Corporation	20 Jun 1984

	Reply Comments Filed
GTE Spacenet Corporation	1 Aug 1984
Satellite Business Systems	1 Aug 1984
	Late Reply Comments Filed
Communications Satellite Corporation	2 Aug 1984

APPENDIX B - 1

United States of America

PROPOSALS

General Comments

The United States of America reaffirms its commitment to the historic purposes of the International Telecommunication Union. The Union's self-evident accomplishments in improving world-wide cooperation and promoting more efficient use of the radio spectrum and geostationary-satellite orbit (GSO) have been commendable. In recognition of this record, the United States continues to be committed to achieving agreement among all Administrations on pragmatic, workable ITU arrangements.

The current regulatory regime was established pursuant to Article 33 of the International Telecommunication Convention and is embodied in Articles 11 and 13 of the Radio Regulations. This regime has in practice enabled all Administrations to access the GSO and the frequency bands allocated to space services to meet their common and individual telecommunication requirements in all services and bands for which such access has been sought. Over three hundred satellite networks have been successfully coordinated and registered with the ITU, extending the benefits of satellite technology to the countries of the world. The fact that all satellite networks proposed by Administrations have been accommodated is testimony to both the effectiveness of the ITU as an international cooperative forum and of the methods and procedures it has developed. Any new planning approach must be comparably effective in bringing about these benefits to all.

Nevertheless, concern by many Administrations over future access to the GSO and the frequency bands allocated to space services has raised the question as to the workability of the existing regime for accommodating long-term requirements. Noting this concern, Resolution No. 3 of WARC-79 called for the convening of a conference whose aim would be to improve the arrangements for these bands and provide all Administrations with guaranteed equitable access in practice to the GSO.

The USA supports the objectives of Resolution No. 3. For those space services and frequency bands where a definite need can be shown, the USA is prepared to consider alternative planning approaches keeping in mind that continued advances in technology have created, and may be expected to continue to create, orbit capacity at a higher rate than demand for its use. With the cooperation of Administrations, these objectives can be achieved through appropriate regulatory procedures, planning approaches, or a combination of the two.

Any planning approach must be consistent with the universally accepted principle, recognized in Resolution No. 2 of WARC-79, that Administrations or groups of Administrations are not entitled to permanent priority in the use of particular frequencies and GSO positions in such a way as to foreclose access by other Administrations to the GSO and frequency bands allocated to space services.

For the past several years, many Administrations have bee preparing for WARC-ORB(1). A considerable amount of the technical preparatory work was accomplished in the CCIR Study Groups, culminating in the Conference Preparatory Meeting (CPM). Many valuable contributions were submitted to the CPM and the compilation of this information in the Report is one of the most important technical bases for WARC-ORB(1). The Report contains information relating to the agenda items of the Conference and includes: a description of the prevailing situation, planning principles, methods, and guidelines for regulatory procedures. Other CCIR materials, as well as contributions of Administrations to the Conference, will also provide valuable technical bases.

Although seven planning approaches were identified in the CPM Report, it is expected that Administrations will submit many additional proposals to the Conference. There are a wide range of planning proposals responsive to the objectives of the Conference. A combination of appropriate elements, methods or approaches could form the basis for an improved regime for the intensively used space services and frequency bands.

The IFRB Report also provides valuable advice to the Conference. The experience of the IFRB and Administrations reflected in that Report will be useful in discussing the prevailing situation, and for developing criteria and guidelines for alternative planning approaches. That Report also provides useful information concerning specific improvements that can be made to the procedures currently being applied by Administrations and the IFRB.

The USA has been fortunate in playing a major role in the development and implementation of satellite systems. It has already faced the need to increase the capacity of individual satellites as well as to accommodate more satellites in orbit through reduced orbital spacings. The USA believes that this experience can be usefully applied at the Conference in developing methods of accommodating future requirements throughout the world.

Agenda Item 2.1: The situation prevailing in the bands allocated to space services.

Chapter 3 and Annex 3 of the CPM Report to WARC-ORB(1) contain technical and operational information concerning principles, criteria, and technical parameters characterizing the prevailing situation in the space services.

The USA proposes that this material be used as a basis for the work of the Conference, with particular attention being given to the conclusions of Chapter 3 of CPM Report:

- "The situation prevailing involves a complex mix of technological, operational, economic and international and domestic factors."
- "Technological advancements at every level of telecommunication and information systems, from small components to large facilities to entire networks, are occurring at a significant rate."
- "Operational configurations, uses, and infrastructure developments are changing at a significant rate."
- "In some portions of the 4, 6, 11, 12, and 14 GHz bands and some arcs of the GSO, there exists a relatively intensive use of satellites operating in the Fixed-Satellite Service."
- "Most space services, other than the fixed-satellite, broadcasting-satellite and the mobile-satellite services, make little use of the GSO. Access to the GSO by Administrations is not likely to be a problem for these services."
- "Some services that make limited use of the GSO are successfully organized by specialized user communities such as the World Meteorological Organization. Access to the GSO by Administrations is not likely to be a problem for these services."

In considering the prevailing situation for the Fixed-Satellite Service, the USA proposes that the Conference should take into account that many of the techniques necessary to satisfy the world's satellite communication requirements have been implemented in some networks. These include techniques to increase the information transmission capacity of satellite transponders as well as spacecraft antenna beam shaping, domestic use of spot beams, and reductions in orbital spacings to 2 degrees for networks serving the same service area. The USA believes that increased use of such techniques will be necessary, for some bands and arc segments, to accommodate the requirements of the 1990s and beyond.

Furthermore, based on its own analysis and on a careful review of the CPM and IFRB Reports, the USA also *proposes* that the work of the Conference be based on the following general observations and conclusions concerning the prevailing situation:

- All countries have been able to exercise equal rights to satisfy their telecommunication requirements, using satellite technology, and have employed different means and approaches to satisfy their requirements;
- The existing ITU arrangements, in particular the provisions governing the actions of Administrations and the IFRB, have proven to be very successful in affording Administrations access to the GSO/spectrum.
- A wide variety of space services has in fact developed in response to changing requirements;
- Satellite communications through common user systems have represented a cost-effective arrangement for many countries, both as an interim system leading to an independent domestic system and as a continuing arrangement for those developing countries that otherwise may not be able to afford satellite service or whose telecommunication needs are so limited as to make independent satellite services not cost-effective;
- Improvements in technology have been able to satisfy growing demands for orbit capacity and orbit access at reduced unit cost;
- The value of introducing new technology and more efficient spectrum and orbit management techniques has been widely recognized and their implementation has proven to be feasible;
- Substantial demand for service in the FSS has led the USA to prescribe a maximum orbital spacing of between adjacent USA satellites which users must be prepared to accept. It has been found that this approach is both economically and operationally viable and conducive to achieving a high orbit utilization efficiency.

Agenda Item 2.2: Which space services and frequency bands should be planned.

The USA *proposes* that decisions as to which space services and frequency bands should be considered for alternative regulatory arrangements or planning approaches should be based on the following factors: allocation status, operational status, economic impact, specialized user community, technology status, operational characteristics, and GSO utilization intensity.

Services. Based on the above factors, the USA *proposes* that only selected bands of the Fixed-Satellite Service warrant any further consideration, and that the following space services should not be considered:

- Broadcasting-Satellite
- Mobile-Satellite
- Radiodetermination-Satellite

- Space Operation
- Amateur-Satellite
- Earth Exploration-Satellite
- Meteorological-Satellite
- Inter-Satellite
- Space Research
- Standard Frequency and Time Signal-Satellite

Bands. In giving the Fixed-Satellite Service further consideration, the USA *proposes* that only certain portions of the FSS bands between 3700 and 7075 MHz be considered.

This part of the spectrum provides the most favorable and economic propagation characteristics and is the most widely used in the Fixed-Satellite Service. The allocations of these bands are consistent world-wide. In addition, a large number of countries have had many years of experience operating in portions of these bands. Other portions were opened to the FSS by the WARC-79 and parts of these bands could provide substantial added capacity for use by new systems which will operate in that Service.

In reaching any decision under this Agenda Item, Administrations should note the inherent constraints on the kinds of planning approaches that can be applied to the Fixed-Satellite Service in these bands. These constraints derive from the magnitude of investment in current operational and planned networks, the diversity of communications services and facilities involved, and the rapidly changing technology available throughout the world.

Many nations have significant investments in both domestic and common user satellite systems. For example, the USA has invested well over two billion dollars in domestic satellite facilities and worldwide investment in the INTELSAT and INMARSAT systems is of the same order. Any planning of the Fixed-Satellite Service must recognize this investment and provide for the continuity of service to the users of these systems. On the other hand, any planning approach must recognize the need to accommodate new networks through appropriate steps taken by the operators and users of these existing systems to share the technical, economic and operational burden of satisfying growing worldwide requirements.

Typical fixed-satellite networks include earth station antenna diameters ranging from less than one meter to thirty meters, and provide voice, data and television services in point-to-point and point-to-multipoint configurations. In the latter case, hundreds to thousands of earth stations may comprise a user communications network. The capacity of individual links may range from one to several thousand voice channels or from 1.2 kbps to 90 Mbps. Network use is for a wide range of applications, from the provision of high density traffic links between major telephone switching centers to the provision of thin route, minimal telecommunication services to rural areas of the country.

In addition, the associated technology is very rapidly changing to provide these services ever more economically and efficiently.

Agenda Item 2.3: Principles, technical parameters and criteria for planning; guidelines for associated regulatory procedures.

The USA endorses the fundamental principle that all countries have equal rights to satisfy their telecommunication requirements.

In accordance with Resolution No. 3 of WARC-79 and Resolution No. 895 of the Administrative Council, the essential objective of the Space WARC is to guarantee, in practice, for all countries, equitable access to the GSO and to the frequency bands allocated to the space services utilizing it.

The USA supports the conclusions of Resolution No. 2 of WARC-79, which called upon countries having frequencies registered with the IFRB for their space services, to take all practicable measures to realize the possibility of the use of new space systems by other countries. This resolution embraces the important principle that no country or groups of countries have permanent rights to particular frequencies and/or orbit positions.

Any planning approach must recognize the relevant technical aspects of the special geographical situation of particular countries.

Any planning approach that is to achieve an assignment density commensurate with requirements must include means for the resolution of potential cases of interference between and among networks which are in place or put up in response to existing or new requirements. Any planning approach that seeks to avoid such a procedure is likely to impose artificial restrictions on the ability of Administrations to satisfy their requirements and deny access to the orbit that could be otherwise be achieved. It is therefore essential that appropriate procedures for resolution of potential interference problems be available, and that Administrations cooperate in applying these procedures. Such procedures must be at least as effective as the existing coordination procedures in the successful resolution of potential interference problems.

Principles. The USA *proposes* that the following principles govern any planning approach:

A. *Requirements*

1. An Administration's requirement for access shall be accommodated when needed.

2. The option for an Administration to satisfy its requirements through participation in a common user system shall be available.

3. Any planning approach shall provide a means to accommodate changing requirements of Administrations while also providing for the need to minimize disruption of existing networks.

B. *Existing Systems*

4. Existing satellite networks of Administrations, including those under active development, shall be accommodated.

5. Any planning approach shall aim to maintain the continued viable operation of existing space systems; in particular, changes involving economic or operational impact shall be minimized.

6. Any planning approach shall provide for continuity of established service through replacement of satellites, including those that prematurely fail.

C. *Efficiency of Use*

7. Any planning approach shall, in satisfying the requirements, progressively achieve more efficient use of the GSO/spectrum resource consistent with each space system's technical, operational, or economic factors.

8. Any planning approach shall be capable of increasing orbit/spectrum capacity by reducing orbital satellite separations and by increasing the reuse of orbital positions. These techniques shall be applied in response to demand and to the extent feasible under prevailing technical, operational and economic conditions.

D. *Technical and Operational Flexibility*

9. Any planning approach shall be adaptable to the introduction of new technology.

10. Any planning approach shall be capable of accommodating a broad range of technical and operational requirements.

E. *Rights of Other Services*

11. The rights of all radio services, particularly with respect to primary allocations in the band of concern, shall be honored in any planning approach.

Planning Approaches. The USA believes that the various planning approaches discussed in the CPM Report may provide a useful starting point for consideration by the Conference. However, such approaches only illustrate some planning approach elements. Flexibility is needed to select the most practical elements from any of these or other methods considered by the Conference to achieve an agreement on any selected planning approach.

The USA *proposes* that any planning approach must:

- Be capable of accommodating increased demand for GSO/spectrum access, by means of progressive reduction in necessary intersatellite spacing and/or progressive increase in the frequency reuse potential of individual orbit locations.
- Assure that existing systems will continue to be accommodated as new systems are introduced and that the burden of access will be shared among all systems over time.
- Provide for effective technical and operational means by which affected Administrations may resolve potential interference problems between networks on a timely and equitable basis. The means provided for such conflict resolution should recognize the use of world, regional, subregional or bilateral forums, as appropriate.
- Include only realistic requirements in any planning approach.
- Be responsive to the complex, heterogeneous, and dynamic nature of existing and planned fixed-satellite systems at reasonable administrative costs.

Guidelines. The USA further *proposes* that the guidelines for the associated regulatory procedures should be developed in conjunction with any planning approach and the guidelines should be identified in sufficient detail to allow specific text to be proposed by Administrations to the second session of the Conference. These should include as a minimum:

- Identification of proposed networks, as the need arises for them,
- Procedures and technical guidelines for the resolution by the affected Administrations, of potential technical incompatibilities, as they arise.
- Identification of the steps to be taken by both existing operators and new network operators to promote equitable sharing of the burden of accommodation of new networks.
- Accommodation of new or modified requirements.
- Procedures to assure that adequate technical improvements are applied to existing and new systems to permit an increasing number of systems to be accommodated.
- Replacement of operational space stations.
- A simplified means for accommodating new or modified earth stations and services within a previously coordinated network.
- Notification, examination, and recording of frequency assignments in the Master Register.
- Modification of assignments.

Agenda Item 2.4: Guidelines, as necessary, for regulatory procedures pertaining to space services and frequency bands which have not been identified for planning.

The USA *proposes* that the existing articles of the Radio Regulations should be retained for such services. However, these provisions should be carefully reviewed and modified in accordance with the following guidelines:

- Unnecessary steps should be eliminated to make the procedures as simple as possible.
- The total amount of time needed to complete the process should be as short as possible.
- The administrative burden on Administrations and on the Board should be as small as practical.
- Guidelines should be provided on the steps to be followed in coordinating potential interference problems to insure that the burden of accommodating new networks is equitably shared by both existing and new networks.
- The actions required of Administrations should be stated as clearly as possible, particularly with respect to the resolution of potential interference conflicts.

It would also be desirable for the CCIR to identify means and methods by which the large number of coordinations required under the current Appendix 29 procedure could be materially reduced, and to develop guidelines for the successful resolution of any remaining cases of potential interference.

Agenda Item 2.5: Other possible approaches.

To enable the Conference to consider the widest possible range of views of Administrations, the USA *proposes* that agenda items 2.2 and 2.5, both of which deal with planning approaches, be treated concurrently and on an equal basis.

Agenda Item 3: Feeder link planning for Regions 1 and 3.

At the present time, the USA does not intend to submit proposals relating to this agenda item. It is noted that the CPM Report contains a significant amount of information on this subject, much of which was contributed by this Administration based on our experiences in carrying out feeder link planning at the 1983 Broadcasting-Satellite Conference for Region 2.

Agenda Item 4: Resolution No. 505 of WARC-79.

This agenda item referring to Resolution No. 505 of WARC-79 provides for the Conference to consider technical parameters and characteristics relevant to the introduction of a Broadcasting-Satellite Service (sound) in the frequency range 500-2000 MHz.

The CPM and the relevant Study Groups of CCIR have studied this matter and concluded that such a service would likely require an exclusive allocation for each Region or area of coverage. Taking into account the previously cited studies, it appears that no spectrum is available in the range 500-2000 MHz. Extensive operations by terrestrial services in these bands must continue to be accommodated. However, such service offers benefits to some countries and the USA therefore *proposes* that the Conference direct the CCIR continue studies of sharing options and criteria in the expanded frequency range including bands below 500 MHz and above 2000 MHz.

Agenda Item 5: Actions during and after the first session.

The USA does not intend to submit proposals relating to this item in advance of the first session, because action on the various sub-items of this agenda will depend greatly on the discussions and conclusions of the first session.

Agenda Item 6: Incorporation of the 1983 RARC-SAT-R2 Decisions into the Radio Regulations.

The Administrations of Region 2 participated in a Regional Conference for the Planning of the Broadcasting-Satellite Service, Including the Associated Feeder Links, which adopted final acts. Certain resolutions and recommendations of that Conference outline actions to be taken prior to and during WARC-ORB(1) to facilitate incorporation of the relevant decisions of that Conference into the Radio Regulations. The Plenipotentiary Conference, Nairobi, 1982, decided in paragraph 2.3 of its adopted Resolution 1 that the incorporation of the relevant decisions of RARC-SAT-R2 into the Radio Regulations should be included on the Agenda of the first session of the Space WARC (i.e., WARC-ORB(1)). By resolution of the Inter American Telecommunications Conference (CITEL), members of that Region 2 organization have endorsed incorporation of the relevant decisions of the 1983 RARC-SAT-R2 into the Radio Regulations. The USA supports this endorsement and intends to further address this agenda item in a separate proposal.

Common Carrier
Fiber Optic Cable Systems

The Commission issues a Memorandum Opinion and Order regarding the Commission's general policy direction on transatlantic fiber optic submarine cable systems as proposed in applications filed by Tel-Optik Limited and Submarine Lightwave Cable Company.
—*Tel-Optik Limited*

FCC 85-99

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Tel-Optik Limited	File Nos. I-S-C-L-84-002 I-S-C-L-84-003
Application for a license to land and operate in the United States a submarine cable extending between the United States and the United Kingdom	
In the Matter of Submarine Lightwave Cable Company	File No. S-C-L-85-001
Application for a license to land and operate in the United States a high capacity fiber optic digital submarine cable extending between the United States and other North American countries, on the one hand, and European countries, on the other hand	

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 1985; Released April 5, 1985

BY THE COMMISSION:

1. The Commission has before it applications filed by Tel-Optik Limited ("Tel-Optik") and Submarine Lightwave Cable Company ("SLC")

pursuant to the provisions of "An Act relating to the landing and operation of submarine cables in the United States," 47 U.S.C. §§ 34-39 (1964); (hereafter referred to as the Cable Landing License Act) for licenses to land and operate in the United States high capacity fiber optic digital transatlantic submarine cable systems. Both applicants propose privately owned systems in which they would sell or lease capacity to private users on a non-common carrier basis. Tel-Optik has filed applications for two fiber optic cables; SLC has filed an application for one fiber optic cable.

2. The two Tel-Optik applications were placed on public notice on October 3, 1984. Comments were filed by the National Telecommunications and Information Administration ("NTIA"), American Telephone and Telegraph Company ("AT&T"), Communications Satellite Corporation ("Comsat"),[1] and RCA Global Communications, Inc. ("RCA"). Tel-Optik filed consolidated reply comments. Comsat also filed reply comments and ITT World Communications Inc. ("ITT") filed a partial opposition to AT&T's comments.

3. The SLC application was placed on public notice on October 24, 1984. Comments were filed by NTIA, AT&T, Comsat, ITT, RCA and Tel-Optik. Both SLC and Comsat filed reply comments.

4. The applications before us present the Commission and the executive branch an opportunity to continue U.S. government support in the development of a diversity of international communications technologies and modes and to achieve more meaningful competition in the provision of North Atlantic transmission facilities. We believe that competition in the form of private submarine cable transmission facilities will result in the same desirable user-benefits now available as a result of our domestic satellite transponder sales policy[2] and we find no public interest reason to require these facilities to be made available on a common carrier basis. The purpose of this order is to provide the Commission's general policy direction on alternative submarine cable systems for the North Atlantic region, to reach preliminary conclusions regarding the particular applications before us, and to solicit the approval of the Secretary of State before taking any final action on the applications.

I. The Applications

5. Tel-Optik is a U.S. corporation in which all directors, officers and stockholders are U.S. citizens with the exception of one Canadian citizen

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[1] Comsat filed a motion to file comments one business day out of time because of the need to secure final review of its pleading by Comsat senior management and word processing delays caused by the preparation of another pleading. We will grant this motion and accept the comments.

[2] Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd*, World Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

serving as an officer, director and stockholder. Tel-Optik has entered into an agreement with Cable and Wireless PLC ("C&W"), a public limited company organized under the laws of the United Kingdom, for the purpose of constructing, owning and operating two fiber optic cables between the United States and the United Kingdom. Tel-Optik and Cable & Wireless each owns fifty percent of this joint venture. The proposed system, to be called "Market-Link," will consist of a northern cable ("PTAT-1") to be placed in operation in 1989, and a southern cable ("PTAT-2") to be placed in operation in 1992. Each cable will contain three working optical fiber pairs and associated regenerators and supervisory circuits. Each fiber pair will be capable of carrying a minimum of two basic system modules of 140 Mbps. A basic system module for the Market-Link system will consist of a 139,264,000 bps both-way digital line section with interface in accordance with CCITT Recommendation G. 703 (Yellow Book Vol. III-Fascicle III-3, November, 1980).

6. The proposed system has been divided into segments for purposes of determining ownership and operational responsibility. Segment A will consist of all submersible plant of each cable between the U.S. and U.K. beach joints;[3] Segment B will consist of all plant between the beach joints and interface points in the United States for each cable and all land and buildings in the United States associated with each cable; Segment C will consist of all plant between the beach joints and interface points in the United Kingdom for each cable and all land and buildings in the United Kingdom associated with each cable.[4] Segment A will be owned in common in equal undivided shares by Tel-Optik and C&W. Segment B will be owned by Tel-Optik and Segment C will be owned by C&W. According to Tel-Optik, C&W is already authorized to install and operate the proposed cables in England through its wholly owned subsidiary, Mercury Communications, Ltd. ("Mercury"). Mercury will provide facilities over its own and other networks to enable Market-Link to be interconnected with terminals in the United Kingdom and Continental Europe. Tel-Optik expects to land both cables in the United States on the eastern New Jersey coastline to the north of Atlantic City. The cable landing points will connect with a common terminal station to be located in the New York area, which will interconnect with U.S. private and interexchange systems. (In the United Kingdom, the cables are to land on the southwest coast with the southern landing between Widemouth Bay and Bristol and the northern landing either to be at this same coastal area or on the South

[3] The Tel-Optik - C&W agreement defines a beach joint as a connection between the submersible cable and the land cable.

[4] An interface point will be the 140 Mbps digital input/output ports on the digital distribution frame which is the interface location where the 139, 264,000 bps digital line section connects with other transmission facilities or equipment.

Wales coast to the west of Bristol.) Tel-Optik states that these landing points will enable secure routes to common terminal stations in London where interconnection will be made with Mercury.

7. SLC is a U.S. corporation in which all directors, officers and stockholders are U.S. citizens. SLC states that it intends to construct a fiber optic transatlantic submarine cable designed primarily to serve the video market, although its application describes a variety of other services that may be available through purchase of capacity in the cable (*see* para. 9 *infra*). The TAV-1 system (for Transatlantic Video submarine cable system) would extend between the United States and other North American countries to various European points. SLC plans to land TAV-1 in the United States in the vicinity of New York City, with other possible U.S. landing points north and south of New York City. SLC states that other cable terminals may be located in Canada and in the Caribbean region. Unlike Tel-Optik, SLC has not yet determined specific European landing points, but is seeking to make arrangements to locate cable terminals in several of the European nations bordering the Atlantic Ocean and North Sea, as well as extensions to the Mediterranean Basin. The applicant states that "conversations are taking place with foreign entities with respect to the location of foreign terminals and other necessary support for the TAV-1 cable project."

8. SLC states that the TAV-1 cable system will have 12 working fibers each operating at 560 Mbps for a total transmission speed of over 6.7 Gbps. The planned twelve working fibers will be three times that of TAT-8.[5] At a 6.7 Gbps transmission speed, TAV-1 could be arranged for at least 144 broadcast quality video channels, each operating at 45 Mbps. Alternatively, the applicant states that TAV-1 could be arranged for at least 72 video channels and over one thousand 1.544 Mbps channels or various combinations thereof. If the entire capacity were to be dedicated to voice use, the cable could carry approximately 50,000 simultaneous two-way telephone conversations, transmitted at 64 kbps, or up to 250,000 such conversations if circuit multiplication equipment were used. The applicant estimates a total cost of approximately $450 million for TAV-1, as compared to the TAT-8 estimate of $350 million, assuming the same rate of inflation and the same number of landing points as TAT-8, with twelve times the capacity. SLC expects the unit cost for TAV-1 to be less than 15% of the cost of a comparable unit of capacity in TAT-8, whether the unit is a video channel, a 1.544 Mbps channel, a 64 kbps channel, or a "bit" of transmission.

9. The applicant will offer TAV-1 capacity on both a half-circuit and a "through-circuit, shore-to-shore" basis. It will offer such services as (1)

[5] For a description of TAT-8, see American Telephone and Telegraph Co., FCC 84-240, (released June 8, 1984).

broadcast quality video channels operated at 45 Mbps, (2) closed circuit television, (3) public switched videophone, (4) teleconferencing video channels at 1.544 Mbps, (5) electronic document transmission channels at 64 kbps, (6) 64 kbps voice-grade channels for message telephone, private line and other services, (7) 9.6 kbps to 6.0 Mbps high-speed data channels, and (8) restoration services. SLC believes that potential customers for lease or sale of bulk capacity in TAV-1 will include (1) the broadcast and cable television industry, (2) the theater industry, (3) bulk suppliers of domestic fiber optics facilities, (4) U.S. communications carriers, foreign telecommunications carriers and similar entities, (5) government agencies, (6) private commercial corporations, and (7) associations and common affinity groups. SLC states that digital units packaged in large quantities will be made available to meet the specialized needs of these purchasers. The applicant plans to have TAV-1 in service in 1989.

10. Both applicants believe that their proposals will result in significant public benefit. They believe that the lease or purchase of bulk capacity in transatlantic fiber optic submarine cables will provide users with the same advantages that users now enjoy in the long-term lease or purchase of domestic satellite capacity. These benefits include the ability to make future business plans with the assurance that capacity will be available when needed at a known price. The applicants believe that the sale of satellite transponders is equivalent to the distribution of large segments of digital cable capacity since, in both cases, the one-time distribution of communications capacity is involved which need not be classified as a common carrier activity. Both applicants point out that by this approach, users will be able to obtain facilities specifically tailored to their specialized usage requirements. And both applicants emphasize that the U.S. ratepayers will not directly bear the financial risks of the proposed cable systems since the costs will not be part of any common carrier rate base. At the same time, the applicants believe that their proposed systems will be an attractive alternative to currently available and planned carrier facilities and services, and that Commission authorization of the systems will promote North Atlantic facilities competition in the area of specialized services, drive charges for international circuits toward costs, permit a further introduction of the latest fiber optic technology through innovative marketing techniques, and possibly result in the stimulation of new services as a result of heretofore unforeseen demand.

II. Comments

11. In its comments, AT&T states that it supports a fully competitive environment with minimal regulation, and believes that the grant of the requested licenses would be consistent with the development of greater competition in the international telecommunications marketplace. Howev-

er, AT&T only supports the cable applications provided the Commission reconsiders its Title II regulation of AT&T and removes itself as arbiter of carriers' facilities loading decisions. AT&T also requests the Commission to condition a grant of the applications by stating that the Commission will not entertain any request by Tel-Optik or SLC to compel common carriers to use any capacity in their cable systems. And, AT&T requests that the Commission make it clear that the proposed cable systems are not subject to, and should not be a part of, the North Atlantic Consultative Planning process.

12. NTIA supports a fully competitive environment and encourages new entry into the international communications marketplace. Therefore, NTIA supports the grant of these license applications, but only if authorized for non-common carrier purposes. In addition, NTIA urges the Commission to impose three conditions on the licenses should they be granted to assure that authorization of the private systems now proposed will not preclude such additional systems at a later time and to assure that foreign firms are not given preferential treatment over U.S. firms in either the acquisition of capacity or in interconnection arrangements at the foreign ends of the proposed cables. Furthermore, NTIA states that, if the cable systems would be used by common carriers to provide common carrier services, the Commission should examine the significance for the Consultative Process of authorizing facilities outside of the process, and consider the effect on the proposed transatlantic cable facilities already authorized and on U.S. trade opportunity and technology development.[6]

13. RCA also supports the applications as an alternative private enterprise initiative in the international telecommunications marketplace. However, RCA states that the applications pose legal and policy issues which should be addressed in a rulemaking proceeding before any licenses are issued. It notes that some of the issues raised by the applications are already the subject of Commission proceedings, including Docket No. 79-184 concerning policies to be followed in the authorization of common carrier facilities to meet North Atlantic telecommunications needs during the 1985-1995 period,[7] and Docket No. 83-1230 considering, in part, questions involving the grant of indefeasible rights of use (IRUs) in international facilities to non-common carriers.[8] In addition, RCA believes that the fact that a major interest in Tel-Optik's proposed cable system is

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[6] With respect to Tel-Optik's application, NTIA urges the Commission to consider the relationship between Tel-Optik's implied traffic projection and the current Consultative Process traffic projections.

[7] Policies for Overseas Common Carriers, 73 FCC 2d 193 (1979) (Notice of Inquiry), issues specified, 76 FCC 2d 522 (1980) (Second Notice of Inquiry), 82 FCC 2d 407 (1980) (Notice of Proposed Rulemaking), 84 FCC 2d 760 (1981) (Report and Order).

[8] International Communications, 95 FCC 2d 627 (1983).

to be held by foreign interests presents an opportunity for such interests to gain an unfair advantage in the market. Therefore, RCA maintains that the Commission should include appropriate conditions in the cable licenses which would maintain the ability of U.S. companies to compete fairly in the international telecommunications marketplace. RCA also states that the Commission should deny AT&T's request for immediate deregulation. RCA contends that the review of the cable applications is not the appropriate forum in which to consider the future regulation of AT&T and is clearly outside the scope of the proceedings.

14. In its comments, Comsat asserts that the cable applications present significant public policy issues which the Commission should address before granting any cable landing licenses. Comsat supports RCA's proposal that the Commission initiate a rulemaking proceeding. It argues that a rulemaking proceeding would be the proper forum to consider not only these two cable applications but also the broader question of the specific criteria that should govern the consideration of any similar applications that may be filed. Comsat further argues that the Commission should examine the effect of the applications on the integrity of the Consultative Process and on the proceeding in Docket No. 83-1230. In addition, Comsat contends that the cable applications raise the question of whether Title II authorization may be needed, questions whether any public benefits would result from authorizing these systems, and asserts that there will be an increase in the costs of common carrier circuits that would have to be paid by the ratepayers caused by diversion of traffic from common carrier systems should the proposed private systems be authorized.

15. ITT takes no position on the ultimate disposition of the applications. ITT submits, though, that the proposed cable applications should be considered in the North Atlantic facilities planning proceeding in Docket No. 79-184. It contends that, since such facilities are proposed to be available during the 1985-1995 planning period and could be made available to common carriers for their North Atlantic services, the potential availability of the cables could affect the timing or necessity for future facility in the planning period. In addition, ITT argues that the Commission should not grant AT&T's request to remove Title II regulation of AT&T's facilities loading choices. ITT states that, since these proceedings do not involve Title II regulation of AT&T and there is no notice or record on which to base a proper finding, it would be reversible error for the Commission to make any such findings.

16. In reply comments, Tel-Optik and SLC content that their cable applications should not be considered in the Consultative Process or the related Commission proceedings because the Consultative Process and those proceedings only apply to common carriers. The applicants state

that the Commission's authority for its involvement in the Consultative Process and for considering the issues before it in Docket No. 79-184 and Docket No. 83-1230 stems from Title II of the Communications Act to which only common carriers are subject. The applicants argue that they propose to sell bulk capacity on the cable systems to private users on a non-common carrier basis, and therefore are not subject to Title II of the Communications Act. Further, in response to arguments of potential economic harm because of traffic diversion, applicants contend first that diversion is not an issue the Commission need consider because the cables will be privately owned and the ratepayers will not bear the financial risk. In addition, the applicants also contend that to the extent diversion does occur, (1) it will not be substantial because there will be a significant increase in demand for video services which will allow all systems to be sufficiently used, and (2) it will only cause Comsat to lower its rates to a competitive level. Moreover, the applicants argue that subjecting the cable applications to the Consultative Process would be contrary to the deregulatory goals of the Commission. As to the Commission's proceeding in Docket 83-1230 addressing whether non-common carriers have a right to own IRUs in common carrier facilities, the applicants contend that this issue is not raised by their applications because capacity in the proposed systems is specifically intended to be sold to private entities. And, as to NTIA's proposed conditions regarding acquisition of cable capacity and access to foreign networks by U.S. firms, the applicants contend that they could not comply with such conditions and maintain their non-common carrier status.

17. Finally, in comments specifically directed to SLC's application, Tel-Optik, Comsat, and NTIA state that the application itself is flawed because it fails to include the required information. Specifically, the parties note that the application fails to include ownership and controlling interest information and does not specify the landing points of the cable or the foreign countries with which it would interconnect. In its reply comments, SLC notes that it is wholly owned and controlled by U.S. citizens. SLC also states that it would raise the necessary funds to build its cable once it receives a cable landing license and that it would get an operating agreement with a foreign entity within three years of receiving the license.

Discussion

A. General Policy Considerations

18. Upon initial review of the applications and comments, we conclude that alternative private cable systems in which bulk capacity will be sold or leased on a non-common carrier basis would introduce more meaningful competition in the provision of North Atlantic transmission facilities. We

further conclude that this increased competition will provide many of the same user-benefits that are now offered by the private sale of domestic satellite transponders and will further stimulate technology and service development to the benefit of international communications users.[9] We further find no need to require these applicants to operate as common carriers.

19. The introduction of private cable systems would provide users of North Atlantic transmission capacity with new alternatives to satisfy their needs. Bulk users of broadband and high-speed digital satellite circuits will be able to use cable to satisfy their transmission capacity needs and any special operational and technical requirements. We found in our *TAT-8 Authorization Order* that fiber optic technology will permit the use of cable for services that heretofore have only been available via satellite.[10] The application of this technology to cable in combination with the provision of transmission capacity on a non-common carrier basis will result in the same user-benefits that are now offered by the private sale of domestic satellite transponders. In our *Transponder Sales* decision, we concluded that the private sale of transponder capacity on a non-tariffed basis would (1) permit the providers of capacity to make tailored and flexible arrangements with customers that are not possible under the regimen of a tariffed service offering, (2) enable customers to make long-term plans for the use of facilities with assurance as to facility availability and price, (3) permit systems to be specifically designed to customer needs, and (4) result in positive market development for new and innovative service offerings.[11] We find that users with bulk capacity needs or special service requirements for international services should enjoy the same benefits. They could acquire their needed transmission capacity by contract to satisfy any special service needs with the assurance that it would be available for the period of time desired at an

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[9] We recently took one step toward the introduction of greater competition in the provision of international transmission facilities by modifying our *Authorized User* policy to permit Comsat to (1) provide space segments capacity directly to common carriers and non-common carriers alike pursuant to tariff, and (2) offer end-to-end services directly to users on a common carrier basis through a separate subsidiary. Proposed Modification of the Commission's Authorized User Policy Concerning Access to the International Satellite Services of the Communications Satellite Corporation, CC Docket No. 80-170, FCC 84-633 (released January 11, 1985). We determined that this policy would enhance both intramodal and intermodal competition and spur providers of both international satellite and cable services to keep their services innovative and prices low. The introduction of private transatlantic fiber optic cable systems would add additional facility providers to the market which will provide users of transmission capacity new alternatives to satisfying their needs, and further enhance both intermodal and intramodal competition.

[10] American Telephone and Telegraph, FCC 84-240 at para. 75.

[11] Domestic Fixed-Satellite Transponder Sales, *supra* note 2, at 1251-1252, 1255.

established price.[12] They could not be assured that transmission capacity will be so available from current common carrier offerings since carriers must offer capacity indiscriminately as it is available and may change the price and other terms and conditions of their offer through tariff filings. To the extent that users with bulk capacity needs or special service requirements choose to satisfy their special technical and operational needs by acquiring transmission capacity in the proposed private cable systems, there will be pressure on existing providers of both cable and satellite transmission capacity to respond competitively by developing common carrier services that would be more attractive than the long-term lease or sale of capacity.[13]

20. In addition to new service development, the introduction of private transatlantic fiber optic submarine cable systems could stimulate technological development. In the *TAT-8 Authorization Order*, we found that the introduction of digital fiber optic technology in the North Atlantic would have attendant service benefits-i.e., lower noise levels, lower data error rates, and a greater range of services over analog technology.[14] We also noted that the new digital fiber optic technology prompted the development of new circuit multiplication techniques.[15] Private fiber optic cable systems could provide an opportunity for additional technological development. In addition, as noted in the *TAT-8 Authorization Order*, an increase in the use of transatlantic digital cable services could complement the spread of fiber optic technology within the U.S. domestic communications market.

B. Review Under the Cable Landing License Act

21. In acting upon the applications before us, we need not look beyond the Cable Landing License Act. The Cable Landing License Act provides in part that "no person shall land or operate in the United States any submarine cable directly or indirectly connecting the United States with any foreign country . . . unless a written license to land and operate such cable has been issued by the President of the United States." 47 U.S.C. § 34 (1976). The statute was enacted in 1921. In 1934, the function of

[12] For example, television broadcasters which require large digital "bit" streams to transmit their programming could purchase video channels at about 45 Mbps, while newspaper wire services could purchase electronic document transmission channels at 64 kbps.

[13] Comsat asserts that authorization of the proposed private systems will lead to excess capacity and higher per-circuit costs as a result of diversion of traffic. We find here that the long-run benefits offered by the proposed system that are described below will outweigh any short-run problems caused by traffic diversion, and that U.S. carriers and INTELSAT will be able to adjust their long-term facility construction plans to respond to new competition.

[14] American Telephone and Telegraph Co., *supra* note 5 at para. 15, n. 6.

[15] *Id.* at para. 18.

processing cable landing licenses under the 1921 statute was delegated to the Commission through executive order. The President continued to carry out the responsibility of issuing cable landing licenses until 1954 when, by a new executive order, the Commission was delegated the responsibility of both processing applications and issuing licenses.[16] This delegated authority was made subject to the proviso that the Commission may not grant or revoke licenses without first obtaining approval of the Secretary of State and any advice from any executive branch department or establishment of the Government as it may deem necessary. The Commission's rules reflect this requirement.

22. The Cable Landing License Act is intended to achieve reciprocal treatment of United States interests which might desire to lay cables from the United States to foreign points, and otherwise is intended to protect the interests of the United States and its citizens in foreign countries in connection with the issuance of cable landing rights.[17] It both prohibits a cable from being landed without prior authorization and permits revocation of an existing authorization if a country fails to grant United States nationals reciprocal landing rights. While it was enacted at a time when transoceanic cables between the United States and foreign points were owned entirely by one entity, the Act applies in situations where the cable ownership is shared by United States and foreign entities, as is the case with existing transatlantic cables jointly owned by U.S. carriers and foreign administrations. In cases of joint ownership, the objectives of the Act are satisfied if only the United States joint owner is required to obtain

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[16] The current delegation to the Commission is provided in Executive Order No. 10530, dated May 10, 1954, which states:

> Sec. 5. (a) The Federal Communications Commission is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, all authority vested in the President by the act of May 27, 1921, ch. 12, 42 Stat. 8 [sections 34 to 39 of title 47], including the authority to issue, withhold or revoke licenses to land or operate submarine cables in the United States: Provided, That no such license shall be granted or revoked by the Commission except after obtaining approval of the Secretary of State and such advice from any executive department or establishment of the Government as the Commission may deem necessary. The Commission is authorized and directed to receive all applications for the said licenses.

[17] Section 35 of the Act provides, in part:

> The President may withhold or revoke such license when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed.

a cable landing license. The desired reciprocal treatment of the United States joint owner by the foreign administration is achieved because the essence of the joint ownership system is one of partnership and reciprocity.

23. Upon preliminary review of the applications before us, we find that Tel-Optik's applications contain the information required by the Commission's rules and otherwise satisfy the requirements of the Cable Landing License Act. Section 1.767 of the Commission's rules requires an application to contain the name and address of the applicant; the corporate structure and citizenship of officers if the applicant is a corporation; a description of the submarine cable, including the type and number of channels and the capacity thereof; the location of points on the shore of the United States and in foreign countries where cable will land (including a map); the proposed use, need, and desirability of the cable; and such other information as may be necessary to enable the Commission to act on the application. 47 C.F.R. § 1.767(a). Tel-Optik has provided this information, as described above. In addition, Tel-Optik satisfied the threshold reciprocity requirement of the Cable Landing License Act since it has entered into an agreement with Cable & Wireless for the joint ownership and operation of the proposed cables between the United States and the United Kingdom. The two parties will each maintain a fifty percent ownership share in the joint venture. Cable & Wireless is authorized to install and operate the proposed cables in the United Kingdom through its wholly-owned subsidiary, Mercury Communications, Ltd. Subject to further review by the Secretary of State, we conclude that the Tel-Optik-Cable & Wireless agreement contains sufficient reciprocal treatment for each party and otherwise appears to be consistent with United States interests.

24. Three parties contend that the SLC application is incomplete and does not contain sufficient information for the Commission to grant a cable landing license. NTIA states that cable landing license applications are reviewed under the Cable Landing License Act for foreign policy, competition and trade concerns in view of foreign participation in the ownership and operation of cable systems. NTIA contends that the SLC application does not contain sufficient information relevant to these issues, such as information on financing, configuration, operations and foreign participation. NTIA believes that the applicant should be required to provide this information subject to public comment before the Commission acts on the application. Tel-Optik contends that the SLC application does not comply with Section 1.767(a) of the Commission's rules. Tel-Optik states that the application fails: (1) to provide information on the identity or percentage of ownership of its stockholders; (2) to specify the location of points on the shore of the United States and in foreign countries where

the cable will land (including a map); or (3) to name the foreign country or countries where the cable will land. Tel-Optik submits that SLC has not complied with the Commission's rules until it discloses the identity of those who own and control the company and concludes an agreement to land the other end of the cable in at least one specified country. Comsat contends that the Commission should not grant a cable landing license to SLC without requiring sufficient information about the legal, technical, operational and financial qualifications of the applicant, including the names of SLC's principals and their relative ownership shares, the financial arrangements for cable construction, and the foreign countries in which the cable will land and whether these countries will permit landing and use of the cable.

25. In reply, SLC provides information showing the relative ownership shares of its shareholders. SLC argues that there is no existing requirement by the Commission that an applicant for a cable landing license need submit financing plans prior to grant of its application, nor should there be one in a competitive situation. SLC states that it will raise the necessary capital funds following a grant of its cable landing license, and suggests the need for a license before financing can be arranged. In addition, SLC states that it will obtain the necessary foreign agreement for its proposed cable following grant of its cable landing license and that such a grant will facilitate the necessary agreement for foreign landing points. SLC cites past Commission actions in granting Section 214 facility construction and service authorizations without the prior acquisition of necessary foreign agreements as support for not requiring it to acquire a foreign agreement prior to grant of a cable landing license. SLC believes that its application is in substantial compliance with the Commission's rules and requests a waiver of Section 1.767(a) to the extent that a waiver is necessary to bring this older rule in conformity with modern policies.

26. Upon review of SLC's application and reply comments, we find that the applicant has provided sufficient information regarding its corporate structure and citizenship of its officers. We agree with SLC that the Commission's rules do not specifically require that an applicant for a cable landing license present information as to its financial qualifications. However, notwithstanding the Commission's policy of not requiring applicants to show the existence of an operating agreement with its foreign correspondent before issuing Section 214 authorizations, Section 1.767(a) specifically requires an applicant for a cable landing license to specify the location of points in foreign countries where the cable will land and to provide a map showing the proposed landing points. This information is necessary for proper review of the application under the Cable Landing License Act. Without information as to the final ownership and control of the cable system and the foreign points in which it will land,

we cannot determine under Section 35 of the Cable Landing License Act whether reciprocal treatment is being accorded to United States interests. In other words, unless we have information as to what countries the applicant is dealing with and the terms and conditions of arrangements for ownership and operation of the system, we do not believe that we can fully review the application under the Cable Landing License Act. Therefore, SLC must provide this information before we will take final action on its application.

C. Need for Title II Authority

27. In its comments, Comsat contends that Tel-Optik and SLC may need Title II authority to construct and operate their proposed cable systems and the applicants provide no basis for the Commission to forbear from exercising its Title II authority. Comsat argues that Tel-Optik's and SLC's distinction between private and common carrier is illusory because of the types of services for which the systems may be used; the absence of any mechanism that would preclude or prevent the applicants' customers from interconnecting with the public switched network; the fact that C&W, a 50% owner of the proposed Market-Link system, is a carrier under U.K. law; and the fact that the applicants cannot show that the traffic, which would be carried by the proposed systems, is not presently being carried on common carrier facilities.

28. We find Comsat's argument unpersuasive. We find no need to require applicants to apply for Title II authority or to decide whether to forbear from exercising Title II jurisdiction. The applicants satisfy the test of the *NARUC I* decision which held that certain offerings need not be classified as common carrier operations. First, the nature of their proposed offerings is outside the definition of common carriage. The applicants propose to sell bulk cable capacity through individual negotiations with potential customers in order to meet the customers' particular technological and marketing requirements. They state that they will be entering into sales or long-term contracts for a particular amount of digital capacity. The Commission previously found in its *Transponder Sales* decision that the sale or long-term lease of domestic satellite transponders by satellite owners does not constitute common carrier activity.[18] In that decision, the Commission considered the definition of common carriage as set forth in the *NARUC I* decision and concluded that the sellers of domestic satellite transponders do not hold themselves out indifferently to serve the user public.[19] We find no distinction between what the cable applicants propose and what we found to be non-common

[18] Transponder Sales, *supra* note 2, at 1256.

[19] *Id.* at 1257; *see* National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.) *cert. denied*, 425 U.S. 999 (1976) ("NARUC I").

carrier activity in our *Transponder Sales* decision. Thus, we find that Tel-Optik and SLC would not be engaged in common carrier activity by selling or leasing bulk capacity in their proposed cables.

29. The second part of the *NARUC I* test as stated in *Transponder Sales* is whether there is a public interest reason for the Commission to require facilities to be offered on a common carrier basis. In our *Transponder Sales* decision, we found that, due to the Wide-scale availability of common carrier transponders and the likelihood that small users could finance the lease or purchase of non-common carrier transponders, we did not need to compel the continued offering of all transponders on a common carrier basis. The facts before us here present even less reason to require that these cables be offered on a common carrier basis. There is currently no shortage of common carrier-provided cable or satellite capacity in the North Atlantic. Unlike domestic satellites, cable capacity is not limited by problems of spectrum allocation or orbital slot assignment.[20] In addition, due to the nature of the planned offerings, we do not believe diversion from common carrier cables should be a major concern. The proposed private cables are intended for use by customers with bulk capacity or special service needs. These users are generally private line customers. In the North Atlantic, the area for which these systems are proposed, non-switched services provided by U.S. carriers account for only about ten percent of international circuits, while switched services account for about 90 percent of international circuits (89 percent is IMTS and one percent is telex).[21] In addition, some customers with bulk capacity or special service needs may require satellite facilities to carry their traffic. As a result, the proposed cables are not likely to divert but a small part of total common carrier circuits. Some users may be able to use their non-switched facilities for voice traffic by attaching PBXs and refiling with other countries. However, the potential for switched traffic diversion in this manner appears to be relatively small.

30. Neither do we anticipate significant common carrier use of the proposed cables. AT&T has stated that it does not intend to use the cables and the international record carriers (IRCs) have not indicated an interest in the cables. We have no reason to expect AT&T and the IRCs to change their positions in view of the significant cable capacity that already exists or is planned and the carriers' significant investment in these facilities, particularly TAT-8. Since nearly 90 percent of Comsat's traffic is switched services, we do not believe the effect on INTELSAT from diversion of bulk capacity or special service customers would be harmful to INTEL-

[20] For these reasons we find it unnecessary, as we decided in *Transponder Sales*, to review each transaction concerning these cables on a case-by-case basis to ensure adequate transatlantic capacity.

[21] Data derived from December 1984 circuit status reports.

SAT.[22] Should AT&T or other carriers propose to use private cable facilities, we will have an opportunity to consider the potential effect of traffic diversion from existing or planned satellite or cable common carrier facilities in the Section 214 application process. Common carriers which propose to purchase and use bulk capacity on these systems still would be required to file for Title II authority before acquiring capacity and providing service over the cables. Therefore, if common carriers seek to divert major amounts of traffic from existing transmission facilities, we can take any steps necessary at that time to determine whether significant economic harm to common carriers owning and using existing cables would occur and would be contrary to the public interest.

31. Thus, the issues raised by Comsat do not persuade us that the proposed offerings will in fact be common carrier offerings, and do not present reasons justifying the denial of a cable landing license. As we have concluded that these applications are for non-common carrier offerings, we have only to consider the requirements of the Cable Landing License Act in acting on the them.[23]

D. Relationship With the North Atlantic Consultative Process and Related Commission Proceedings

32. Several parties contend that the applications should be considered within the ongoing North Atlantic Consultative Process and other related Commission proceedings. The Consultative Process is essentially an ongoing process to discuss facility planning options for the North Atlantic among Canadian (Teleglobe Canada), European (CEPT), and American (the Commission, other U.S. governmental agencies, and U.S. carriers) entities. It is intended to consider demand, technology, costs, usage, and facility options before we are called upon to make a determination of a facilities authorization. Comsat believes that authorization of the proposed cable facilities outside of the Consultative Process would compromise the integrity of the process by forsaking it in favor of an *ad hoc* approach and by failing to consider the views of foreign entities. Similarly, ITT contends that consideration of the proposed cable systems must be incorporated into Docket No. 79-184. Docket No. 79-184 was initiated by the Commission as an adjunct to the Consultative Process, to develop U.S. policies and guidelines governing the construction and use of North Atlantic facilities during the 1985-1995 period.

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[22] Since satellite facilities are not proposed by the applicants, no Article XIV(d) coordination with INTELSAT will be required.

[23] In addition, the trade and technology issues raised by NTIA, see para. 24, *supra* are unsupported. We note that the executive branch will have the opportunity to pass on the applications.

33. On the other hand, AT&T contends that the Commission should make it clear that the proposed cables are not subject to, and should not be part of, the Consultative Process. Both applicants strongly oppose incorporation of their proposals in either the Consultative Process or Docket No. 79-184. The applicants and AT&T argue that the Commission's involvement in the Consultative Process flows from its Section 214 authority, that the proposals under consideration are for non-common carrier systems, and that they are therefore unrelated to the Consultative Process and Docket No. 79-184. NTIA believes that there are some ambiguities in the applications that indicate that capacity in the proposed cable systems could be acquired by carriers to provide common carrier services. If the systems are to be used by common carriers, NTIA states that the Commission should consider: (a) the effect of authorizing, outside of the Consultative Process, facilities which may carry common carrier services; (b) the effect on facilities already authorized to be used for common carrier services; (c) the traffic projections implied by the applicant which appear to be much greater than the projections by the Consultative Process; and (d) the effect on U.S. trade opportunity and technology development.[24]

34. We believe that the decision as to whether or not to grant cable landing licenses to the applicants should not be incorporated into either the Consultative Process or Docket No. 79-184. The Consultative Process and Docket No. 79-184 deal with North Atlantic transmission facilities which are used by authorized U.S. common carriers and their foreign correspondents for the joint provision of services. As we have found, neither applicant proposes to provide common carrier services. Both intend to make private investments in their respective systems at their own risk to sell or lease bulk capacity to users. The risk of investment will not directly fall on any common carrier ratepayers and the scrutiny given by the Commission under Section 214 for facilities investments is not required here.

35. We agree with NTIA that the applicants appear to have reserved the possibility to provide capacity over their systems to common carriers. Any carrier which may want to use either proposed cable system to provide its services clearly must seek Section 214 authority from the Commission to acquire and operate such facilities. To the extent that any U.S. carriers may intend to use the proposed facilities, we believe that any capacity so employed could be considered within the Consultative Process. Since no carrier has stated plans to use the proposed private cable systems, and absent specific information as to the extent of such use, we need not consider at this time the relationship to the Consultative Process

[24] *See* note 20, *supra.*

or the issues raised by NTIA (*see* para. 33, *supra*).[25] In the meantime, we do not believe that potential future common carrier use should delay final action on the applications. Any such delay would deny the benefits that will flow from the proposed systems to users other than common carriers.

B. Request for a Rulemaking

36. RCA and Comsat both request the Commission to initiate a rulemaking proceeding to address legal and policy issues raised by the cable applications. They argue that a rulemaking proceeding is a necessary forum in which to consider not only the specific applications but also the broader question of what specific criteria to apply when considering additional applications. In a rulemaking, they believe that the Commission specifically should examine (1) the effect of the applications on the Consultative Process and Docket No. 79-184, and (2) their effect on questions of ownership in cable facilities that are now being considered in the Docket No. 83-1230. In response, Tel-Optik and SLC maintain that the applications do not raise any material issues of law or policy which would warrant the initiation of a rulemaking proceeding or a delay in the grant of their applications. They argue that each of RCA's and Comsat's stated concerns is sufficiently addressed in their applications and comments.

37. We find that a rulemaking proceeding at this time is unwarranted. Tel-Optik and SLC have submitted proposals which request authority which is unprecedented. We have broad authority to proceed by rulemaking or by *ad hoc* adjudication. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). We find the record in this proceeding to be fully adequate to resolve the applications before us. Numerous parties have participated in this proceeding, including primary providers of competing services. In addition, rejected above the contentions of RCA and Comsat that action on the applications need to be related to Docket No. 79-184 and the Consultative Process. *See* paras. 32-35, *supra.* We also conclude that the applications are not related to Docket No. 83-1230 because that proceeding concerns, among other issues, non-carrier acquisition of IRU's in common carrier transmission facilities.

F. Suggested Conditions for the Cable Landing Licenses

38. Some parties propose that certain conditions be imposed on any cable landing license that may be granted to the applicants. AT&T proposes that we condition any license by specifically stating that we "will not entertain" any request by the applicants to compel common carriers to

[25] There may be a need to consider the presence of such private systems in the Consultative Process because of their effect upon the demand for additional common carrier provided facilities that are subject to the Consultative Process. However, this question is better addressed when the cables are constructed and we know what type of traffic and how much is being carried.

use their cable systems. AT&T believes that by such a condition, the Commission would explicitly recognize that the applicants' proposals do not seek any special treatment and must succeed or fail on their own merits. AT&T also believes that such a condition would send the proper signal to the investor community and lead to the appropriate economic allocation of capital resources. Tel-Optik states that it has not requested that the Commission compel common carrier use of the proposed system, does not envisage making such a request and thus does not seek special treatment. SLC does not believe that any conditions are necessary other than those that it proposed be inserted in its own license.

39. We agree that the applicants should not be guaranteed any market share or services. Should we ultimately grant cable landing licenses for the proposed private cable systems, we will do so without any guarantee of traffic from U.S. international common carriers or other sources. It shall be this Commission's policy that any such private systems succeed or fail on their own merits and not through Commission action that would guarantee common carrier use of the systems. At the same time, we will not prohibit common carrier use of the system and will consider any proposed common carrier purchase of capacity in the context of our normal facility planning and authorization procedures. In view of this approach, we see no need to impose AT&T's proposed condition.

40. In addition, although AT&T fully supports the authorization of private cable systems in the transatlantic, it does so only if the Commission reconsiders and withdraws from regulating AT&T's facility loading choices. RCA and ITT contend that the Commission should deny AT&T's request, because this proceeding is not the forum in which to make such a determination. We agree. We are only considering here whether to grant cable landing licenses to the applicants to land and operate private transatlantic cable systems. We are not considering issues relating to our Title II regulation of AT&T's facility loading choices. Since the proposed systems are not scheduled for operation until 1989 at the earliest, we will have sufficient opportunity to consider AT&T's proposals. Any consideration of the merits of AT&T's request within the context of these applications would be beyond the language of the Cable Landing License Act.

41. NTIA requests that any cable landing license granted to the applicants be conditioned: (1) not to preclude approval of additional cable systems between the United States and Europe; (2) to require that cable capacity should be made available to authorized entities on a non-discriminatory basis under Commission imposed terms and conditions; and (3) to require that subscribers of cable capacity be given the same interconnection rights with non-U.S. facilities as foreign entities would be given to interconnect with U.S. facilities. The applicants do not oppose

NTIA's first proposed condition. However, they do oppose the second two conditions which they believe would be inconsistent with and not permit them to maintain their non-common carrier status. As to the second condition, the applicants point out that the sale of bulk cable capacity under individual terms and arrangements made with each private entity is the essence of their proposal and that the proposed second condition may not permit them to operate in this manner. In sum, they state that individualized sales or leases may, almost by definition, raise discrimination issues. The applicants also state that they could not comply with the third condition, because they would have no control over the interconnection arrangements negotiated between the acquirer of capacity and C&W (or Mercury). They emphasize that they would merely be selling capacity that another entity would use.

42. NTIA's first proposed condition is intended to maintain the rights of U.S. companies which may desire, own, and operate cable transmission facilities in the future by assuring that the authorization of the proposed private cable systems will not preclude future authorization of other systems. We believe this condition is unnecessary in light of our finding concerning the long term benefits of increased intramodel competition. *See* paras. 18-20, *supra.* As to the second and third conditions proposed by NTIA, we conclude that they would be inconsistent with the concept upon which we have found the proposed systems to be beneficial — the applicants' ability to lease or sell bulk capacity through individual negotiations to meet specific customer needs. To require the Commission to set the terms, conditions, and procedures under which cable capacity would be made available to purchasers could eliminate the applicants' ability to deal with customers on an individual basis, which is an important factor in the applicants' obtaining status as non-common carriers.[26] In addition, under the current proposals, it appears that the applicants would have no control over the interconnection between the cable facilities and the land facilities on either end once the cable capacity is sold. The purchasers of the bulk capacity would be responsible for making their interconnection arrangements.

[26] We would be concerned if, in practice, a foreign owner or co-owner of a cable were to provide capacity to an affiliated switched or enhanced service provider, for example, on terms far more favorable than those offered to U.S. companies providing similar services. We would view such discrimination undertaken for the purpose of, or resulting in, manipulation of competition in a particular service to be inconsistent with the terms of the Cable Landing License Act. We will reserve the right to condition licenses if practices develop that are antithetical to the reciprocal rights of the U.S. carriers, switched or enhanced service providers, or other U.S. citizens.

Conclusion

43. In this order, we have expressed our general policy direction on private alternative submarine cable systems for the North Atlantic region. We have concluded that private systems in which bulk transmission capacity is sold or leased on a non-common carrier basis would introduce more meaningful competition in the provision of North Atlantic transmission capacity, and that such increased competition would provide the same user benefits that are now offered by the private sale of domestic satellite transponders and would further stimulate technology and service development to the benefit of international users. In addition, we have reviewed the two applications before us within the context of the Cable Landing License Act. We have preliminarily concluded that the Tel-Optik applications contain the information required by the Commission's rules, meet the threshold reciprocity showing of the Cable Landing License Act, and otherwise appear to be consistent with United States interest under the Act. However, we will not take final action on the applications until receiving approval by the Secretary of State. In addition, we have preliminarily concluded that the SLC application does not contain the information requested to make these findings. Therefore, SLC must provide certain information to the Commission before we seek approval from the Secretary of State to grant its application under the Cable Landing License Act. As discussed above, we conclude that the applications are not properly part of the North Atlantic Consultative Process, should not be considered within the context of associated rulemaking proceedings, and do not otherwise require initiation of a separate rulemaking proceeding. We further conclude that imposition of the conditions proposed by certain parties have not been shown to be justified under the Cable Landing License Act and would be inconsistent with the nature of the applicants' proposed operations as private systems.

44. Accordingly, IT IS ORDERED that this Order be forwarded to the Secretary of State and that approval be sought to issue Cable Landing licenses to Tel-Optik.

45. IT IS FURTHER ORDERED that SLC must file the information necessary to make its application comply with Section 1.767 of the Commission's rules before the Commission will seek approval from the Secretary of State to grant SLC a cable landing license.

46. IT IS FURTHER ORDERED that Comsat's motion to accept late-filed comments on the Tel-Optik application is granted.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

CATV Carriage, Mandatory Signal
Review Application For

Application for review of delegated denial of signal carriage rule waiver denied. Mandatory signal carriage rules not affected by 1984 amendments to Communications Act.
—*WACCO, Inc.*

FCC 85-111

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
WACCO, Inc.	CSR-2208
Wayne, West Virginia	WV0352
Lavallette, West Virginia	WV0356
Application for Review	

MEMORANDUM OPINION AND ORDER

Adopted: March 11, 1985; Released: March 13, 1985

BY THE COMMISSION:

1. On November 29, 1984, WACCO, Inc. (hereinafter "WACCO"), operator of a cable television system serving Wayne and Lavallette, West Virginia, filed an "Application for Review" of the action taken by the Chief of the Video Services Division, Mass Media Bureau, pursuant to delegated authority, in *WACCO, Inc.* (Wayne, West Virginia). Cable Television Actions Report No. 2923, Mimeo No. 662 (released November 5, 1984). WACCO's application is opposed by West Virginia Telecasting, Inc. (hereinafter "WVAH-TV"), licensee of Station WVAH-TV (Ind., Channel 23), Charleston, West Virginia.[1]

2. WACCO sought a waiver of its obligation to carry WVAH-TV in October 1982. WACCO claimed that its 12-channel system was saturated, and that WVAH-TV could reach its audience off-air. WACCO also asserted that the signal carriage rules were unconstitutional and invalid,

[1] WACCO also filed a reply pleading on December 21, 1984. This pleading, however, was not requested by the Commission, and will not be considered, pursuant to Section 1.115(f) of the Commission's Rules.

and that lack of cable carriage would not harm WVAH-TV. The Division Chief rejected these arguments as insufficient to justify the requested waiver. *WACCO, Inc., supra.*

3. In support of its "Application for Review,"[2] WACCO contends that the Commission lacks authority to enforce the mandatory signal carriage rules in the instant situation. WACCO likens the instant situation to that which the Commission addressed in *WACCO, Inc.,* FCC 83-527 (released November 15, 1983), in which the Commission refused to require WVAH-TV to grant WACCO access to the station's facilities. WACCO claims that the mandatory signal carriage rules exceed the Commission's statutory authority, and violate WACCO's right to equal protection of the laws, because such rules are not imposed on other communications entities with which cable systems must compete. Moreover, asserts WACCO, the rules are not necessary to preserve WVAH-TV from harm nor to ensure it or other UHF stations access to local audiences. Indeed, states WACCO, it offers free UHF loop antennae to its subscribers. WACCO argues that enactment of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. ___ (1984), has limited Commission authority over signal carriage, and claims that it need not analyze impact from its requested waiver on a marketwide basis.

4. In opposition, WVAH-TV argues that WACCO fails to demonstrate any error on the part of the Division Chief, and that the contentions raised by WACCO have long been settled by the Commission. WVAH-TV denies that the Commission's authority over signal carriage has been modified by the Cable Communications Policy Act of 1984, and states that WACCO now carriers seven discretionary signals.

5. We find that the Division Chief did not err in denying WACCO's waiver request. It is settled precedent that the mandatory signal carriage rules are valid and constitutional, *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1038, 1054 n. 71 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979); *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968); *Big Valley Cablevision, Inc.*, 56 RR 2d 429 (1984). Nor do we find any violation of the equal protection guarantee of the fifth amendment since, as we have previously held, different telecommunications entities, such as here, may be subject to differing regulatory schemes. *New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984); *P & R Temmer v. FCC*, 743 F.2d 918, 931-932 (D.C. Cir. 1984); *Com-West, Inc.* (Muskogee, Oklahoma), 94 FCC 2d 1219, 1221 (1983). Moreover, the Cable Communications Policy Act of 1984 continued the efficacy of the mandatory signal carriage rules. *See Notice of Proposed Rule Making In MM Docket No.*

[2] WACCO also, on November 6, 1984, sought an extension of time within which to comply with the Division Chief's order to carry WVAH-TV, due to the need to order equipment, until January 1, 1985.

84-1296, FCC 84-612 (released December 11, 1984); 47 U.S.C. Sections 612(b)(1), 624(f)(2). As the Congressional report accompanying the legislation notes, "Regulations . . . which remain in effect include the FCC's must-carry requirements (47 CFR 76.51 *et seq.*)." H. Rep. No. 98-934, 98th Cong., 2d Sess 70 (1984). *See also id.* at 48. Finally this Commission has also previously heard and rejected arguments based on the off-the-air availability to cable subscribers of UHF stations. *E.g.*, *First Report and Order in Docket Nos. 14895 and 15233*, 38 FCC 683, 701-702 (1965). Similarly, it is settled that applicants for waiver seeking to submit impact analyses must submit them on a marketwide basis. *E.g.*, *Community Tele-Communications Inc. d/b/a Scotts Bluff Cable TV* (Scottsbluff, Nebraska), 95 FCC 2d 229, 247 (1983). We also note that WACCO carries at least 7 discretionary services. WACCO has presented no evidence which would warrant grant of a waiver of our signal carriage rules.

6. In view of the foregoing, we find that grant of WACCO's application is not in the public interest.

7. Accordingly, IT IS ORDERED, That the "Application for Review" filed November 29, 1984, by WACCO, Inc. IS DENIED.

8. IT IS FURTHER ORDERED, That WACCO, Inc. SHALL COMPLY with Section 76.61(a) of the Commission's Rules within thirty (30) days of the release date of this opinion.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Data Processing Service
Common Carrier, Interconnection
Common Carrier, Specialized Services
Tariff, Regulation of

Waivers are granted conditionally of the requirement that certain enhanced services provided by carriers subject to structural separation under *Computer II* be performed outside of their central offices. The specific services addressed are asynchronous/X.25 protocol conversion, and three conditions are adopted to promote the carriers' obligation not to discriminate in the provision of basic service, and to promote meaningful competition.
—*Waiver of Section 64.702*

FCC 85-101

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Petitions for Waiver of Section 64.702 of the Commission's Rules (Computer II) filed by:	
Pacific Bell	ENF-84-15
Southern Bell Telephone & Telegraph Company and South Central Bell Telephone Company	ENF-84-19
Southwestern Bell Telephone Company	ENF-84-20
New York Telephone Company and New England Telephone & Telegraph Company	ENF-84-21
New Jersey Bell Telephone Company	ENF-84-22
Northwestern Bell Telephone Company	ENF-84-23
Pacific Northwest Bell Telephone Company	ENF-84-24
Ameritech Operating Companies	ENF-84-48

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 1985; Released March 26, 1985

BY THE COMMISSION: COMMISSIONER PATRICK ISSUING A SEPARATE STATEMENT.

I. Introduction

1. Before the Commission are eight petitions seeking waiver of the structural separation requirements of the *Second Computer Inquiry* (hereafter, "Computer II") governing the provision of certain protocol conversion offerings by the Bell Operating Companies ("BOCs"). Specifically, the petitioning BOCs seek to be able to perform conversion from asynchronous protocols to standard X.25 packet-switched network protocols (hereafter, ("asynchronous/X.25 conversion") in facilities located in their central offices.[1]

2. Protocol conversion, including asynchronous/X.25 conversion, is included within the definition of enhanced services under the Computer II rules, 47 C.F.R.§702(a). The BOCs are permitted under Computer II to offer enhanced services, including protocol conversion, but only through a structurally separate affiliate utilizing its own separate processing facilities. Any communications channels necessary to the provision of an enhanced service must be acquired by the affiliate under tariff. As long as the affiliate conforms to the Computer II separation requirements, 47 C.F.R.§702(c) and (d), it need not obtain the approval of the Commission to offer any enhanced service.

3. The BOC separate affiliates are thus free to provide asynchronous/X.25 conversion, as well as other protocol conversions, in the same way that the "value added network" service providers (hereafter referred to as "VANs")[2] and other enhanced service vendors today provide similar

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[1] Northwestern Bell Telephone Company also seeks to be able to offer resold basic services within the structurally separate affiliate, as an alternative to relaxation of the requirement that the facilities for enhanced services be separated and not collocated in the central offices of telephone companies subject to structural separation. We address Northwestern's alternative request in the course of our treatment of the petitions below. We use the phrases "BOCs" and "petitioners" when referring to the requests of all of the petitioners for relaxation of the collocation restriction, including Northwestern Bell.

[2] The term "VAN" is commonly used to refer to vendors of switched communications services that acquire common carrier facilities, add economic "value" to them by using them more efficiently than they are used when offered to the public by the underlying carrier, and themselves offer the reconfigured facilities to the public as new services. Traditionally, such value has been created through the use of packet switched technology, which for a long period was not employed by the underlying carriers. Initially, the Commission certificated as common carriers several such VANs, including Telenet and Tymnet, two commenting parties herein. Since these entities' services involved protocol conversion, after Computer II was adopted they were treated no differently than other

services. The BOCs, however, seek to offer asynchronous/X.25 conversion through their operating companies' facilities, in conjunction with existing or proposed basic packet switching services. This approach is inconsistent with the structural separation requirements of Computer II. The BOCs therefore request that we waive Section 64.702(c) of the Rules and allow provision of this particular protocol conversion service on an unseparated basis. Some BOCs go further, requesting that we allow the asynchronous/X.25 protocol conversion to be offered under tariff as a basic service. The BOCs claim that grant of their waiver requests will enable them to provide an inexpensive local data transport service to many customers who are not reached by, or who cannot afford to use, the services of the VANs.

4. An extensive record is available to us in our assessment of the merits of the petitions,[3] and of the effects of a grant or denial on the specific objectives of the Computer II proceedings[4] and on the broader

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enhanced service vendors. Since they offer data transport, rather than information services as such, many in the industry in the United States and in other nations have continued to term them "VANs" to distinguish them from information service providers. This is a distinction without effect under Computer II, and we use the terms "VAN" and "enhanced service provider" interchangeably herein.

[3] First, we placed the petitions on public notice and solicited comments and replies thereon. Second, the staff transmitted comprehensive requests for information to each petitioning BOC. These questions sought detailed information not only on the specifics of the BOC's proposals, but also on the future effects of these proposals on competition and on technological trends in telecommunications. Public comment was solicited on the responses filed by the BOCs. Third, a number of interested entities, including the petitioners, their supporters and their opponents, have made their views known to the Commission through informal filings on the petitions. These filings, which include letters from the public and summaries of oral presentations made to the Commission and its staff, are also part of the record of these proceedings. And fourth, the matters at issue herein were the subject of three years of proceedings in our *Communications Protocols Inquiry* in which a record was compiled on the broad policy issues surrounding structural separation of all forms of protocol conversion, including, but not limited to, asynchronous/X.25 conversion. *See*, 95 FCC 2d 584 (1983) (Memorandum Opinion, Order, and Statement of Principles), 83 FCC 2d 319 (1980) (Notice of Inquiry). The record of that proceeding, which established principles under which requests of this nature will be analyzed, is part of the record herein.

[4] Second Computer Inquiry, 77 FCC 2d 384 (1980), *aff'd on reconsideration*, 84 FCC 2d 50 (1980) and 88 FCC 2d 512 (1981), *aff'd sub nom.*, C.C.I.A. v. FCC 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom.*, Louisiana v. United States, 103 S.Ct. 2109 (1983) (applying structural separation to the then-integrated Bell System). *See also*, Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 FCC 2d 1117 (1984), *aff'd sub nom.*, Illinois Bell Tel. Co. v. FCC, 740 F.2d. 465 (7th Cir. 1984) (applying modified structural separation conditions to the BOCs divested pursuant to United States v. Am. Tel. and Tel. Co., 552 F. Supp. 131 (1982), *aff'd sub nom.*, Maryland v. United States, 103 S. Ct. 1240 (1983)).

statutory objectives upon which they were grounded.[5] It is clear, based on this record, that the BOCs would avoid some economic costs if they could collocate asynchronous/X.25 conversion in their central offices. Such economies should lower the rates that the BOCs would otherwise charge for transmission of data in the asynchronous format and potentially allow those rates to be set lower than those currently charged by the VANs for local data transport. Users of the millions of terminals and terminal-emulating personal computers in the United States which communicate only in the asynchronous format could thereby benefit from reduced cost data service. On the other hand, if these costs are unnecessarily required to be sustained by the public through denial of the requests, only the present vendors of services that include protocol conversion would be benefitted, a result which would be inconsistent with the objectives of the Act.[6]

5. However, it is also clear, based on this record, that a material portion of the savings that BOCs anticipate passing on to the public are not the result of "superior skill, foresight, and industry."[7] Instead, these "savings" result from the BOCs' assumption that waiver will enable them to use at cost the same inter-office transmission channels which competing packet switched service vendors must purchase from the BOCs at higher, tariffed rates. Even if this "price squeeze" by the monopoly provider of local transmission channels could be rationalized with respect to our Computer II rules and decisions, it is unacceptable to us on other grounds.[8]

6. First, it represents improper discrimination under the standards of Section 202(a) of the Act, 47 U.S.C. §202(a). The VANs and other enhanced service vendors, and their customers, would be improperly disadvantaged in that they would be paying a substantially different price than the BOCs' customers using identical transmission channels. The same channels are used in both cases. They are merely to be priced differently. In addition, if the BOCs' cost for transmission facilities is set too low, users of BOC asynchronous format data transmission services employing these underlying transmission channels could be improperly advantaged at the expense of other ratepayers who would sustain costs thereof not assumed by the data transmission users.

7. Second, the BOC proposals to wholesale inter-office channels to the VANs at prices substantially higher than the cost at which they

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[5] *E.g.*, promotion of the availability "so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges. . . ." Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. §151.

[6] *Id.*

[7] United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

[8] *Id.* at 436-438.

themselves would include those same channels in their own packet services is a classic version of the price squeeze, a practice condemned under the antitrust laws. The FCC has authority to enforce certain of the antitrust laws directly,[9] and it weighs in antitrust issues and concerns as part of its broader consideration of the public interest in reaching regulatory decisions.[10] One purpose of the structural separation rules we are asked to waive is to make it difficult for the BOCs to use their control over local transmission facilities to compete unfairly with other enhanced service providers. We must therefore be wary of any waiver request which appears to be premised in part on "benefits" to be derived by BOCs and their customers from squeezing out competitors. Consideration of such potential antitrust implications seems particularly appropriate in this context where pro-competitive decisions of this Commission authorized and promoted the competition among protocol-converted packet switched services that now exists, and that could be threatened by unconditional grant of the asynchronous/X.25 conversion petitions.

8. In view of these and other concerns discussed below, while we grant petitioners' requests that they be permitted to collocate at their central offices asynchronous/X.25 conversion capabilities, their authority to do so is contingent upon their accepting certain conditions. In the absence of such acceptance, their petitions are denied.

9. We recall that we commenced the Second Computer Inquiry because technological changes had so strained the lines drawn in the First Computer Inquiry the entire industry was unable to plan because of regulatory uncertainty. In our Protocols Inquiry, we continued to seek balance between telecommunications efficiency and the multi-faceted goals of Computer II. The record of that proceeding was comprehensive on the efficiency and technological effects of limiting protocol conversion in the central offices of AT&T and the BOCs. However, that record, completed only four years ago does not reflect the current state of the industry. Private and common carrier communications systems that might be used as alternatives to those of AT&T and the BOCs have grown, and AT&T has divested itself of the BOCs. We attempted to alleviate some of the uncertainties created by these and other changes in our November, 1983 *Memorandum Opinion, Order, and Statement of Principles* in the Protocols Inquiry, (hereafter *"Protocols Decision"*). In that Order we adopted principles under which requests such as those before us herein would be evaluated. The uncertainty which has prevailed during the pendency of this proceeding, however, suggests that the waiver process is

[9] 15 U.S.C. §21 (enforcement of Sections 2, 3-7 and 8 of the Clayton Act).

[10] *E.g.*, Satellite Business Systems, 62 FCC 2d 997, recon. denied, 64 FCC 2d 872 (1977), aff'd sub nom. United States v. FCC, 652 F.2d 72 (1980) (en banc). See also, Gulf States Utilities Corp. v. FPC 411 U.S. 747-760 (1972).

insufficient to provide the stability needed by users, carriers, VANs, and other enhanced service providers, whose business planning and decision-making are affected by our decisions.[11]

10. Our experience with this proceeding suggests the need for a different approach to treating problem of protocol conversion. We would be remiss if we did not use the record compiled here as a base to minimize or eliminate uncertainty for the future. Accordingly, in a forthcoming notice of proposed rulemaking we will seek to formulate general rules of future applicability to govern the treatment of protocol conversion and similar enhanced services. Our conclusions and conditions herein have been constructed so as not to foreclose the results of the rulemaking proceeding, and they are without prejudice to its outcome, but they will permit progress to be made during its pendency.

II. The Petitions

A. Background.

11. *Asynchronous Protocols.* The requests before us address the conversion of asynchronous transmission protocols to the synchronous X.25 protocol, currently accepted as the standard interface between users' equipment and a packet network. Generally, the requests are justified on the basis of a particular, existing asynchronous terminal population that is most commonly used for communications purposes. The particular terminal population, considered as the market of interest, are those transmitting an asynchronous serial data stream while using the ASCII code (infra) to encode characters and variants of the RS232 physical interface standard to control the ASCII encoded information. In common parlance these terminals are referred to as "ASCII" data terminals, although ASCII is merely standard manner of encoding characters using binary symbols. The X.25 synchronous transmission protocol, to which the BOCs seek to convert asynchronous terminal transmissions, does not depend on the particular character encoding in use by a given terminal. It can be used for the transfer of ASCII-encoded data or data encoded using other codes.

[11] Some ten months has elapsed since the petitions were filed, yet we have not been dilatory in addressing them. As filed, the petitions did not sufficiently particularize the details of what each petitioner was proposing. Comments point up the need for additional information on the scope of the waiver sought in each case; the extent to which alternative safeguards would secure the goals of Computer II if we waived structural separation for asynchronous/X.25 protocol conversion; and the short and long term effects of waiver on competition, technological trends, and the broad public interest. Information requests and a second round of pleadings produced that information. Without the comprehensive record now before us, it would be difficult to reach the conclusions and judgments that we make today.

12. For example, the EBCDIC, Baudot, and Fieldata[12] codes, which are different from the ASCII one, can also be transmitted using asynchronous protocols, and data using these codes can also be converted to the X.25 transmission protocol. The terminal at the other end of the connection must be able to accept and utilize the specifically-encoded data, but the fact that ASCII or any other is in use in a given call is irrelevant to the network transmission, (although the packet network itself must be able to accept and utilize "header" and call set-up information in the code in which it is transmitted). Since, as noted, much of the BOCs' proferred justification for grant of the petitions is that there are literally millions of existing and potential ASCII terminals and personal computer data terminal devices that could use their protocol conversion capabilities if the waiver is granted, we describe in some detail why this format has become so common.

13. The American Standard Code for Information Interchange or ASCII, has been adopted as a voluntary standard by the American National Standards Institute (ANSI X.3) and is also the subject of international recommendations or standards (CCITT Recommendation V-3;[13] ISO standards 646-1973.[14] While it is, strictly speaking, a code for representing alphanumeric characters in terms of binary symbols, as noted the term "ASCII terminal" is often used more broadly to describe the combination of ASCII coding with other transmission attributes, i.e., serial ASCII coding in asynchronous format, and use of the RS-232C standard for access and transmission control.[15]

14. ASCII originated as the code for asynchronous communications used by TWX teletypewriters in the 1930s, and the RS-232-C interface similarly was developed as a method to control asynchronous teletypewriter transmissions. Teletypewriters often were (and are) used to transfer manually-typed information, and the typist might hit the keys at any time. Because of this, asynchronous transmission character coding normally contains patterns used, not for communications as such, but to permit the receiving device to accept that character whenever it is transmitted.[16]

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[12] EBCDIC is an acronym for Extended Binary Coded Decimal Interexchange, a code commonly used in IBM systems. Baudot is a code named for Emile Baudot, the inventor of the printing telegraph, Fieldata is a code used in military systems.

[13] CCITT Recommendation on International Alphabet No. 5, Vol. VIII, Fascicle VIII-I, Rec. V-3.

[14] 7 Bit Coded Character Set for Information Processing Interexchange, ISO Standard 646-1973.

[15] EIA Standard RS-232C, Interface Between Data Terminal Equipment and Data Communications Equipment Employing Serial Binary Data Inter-exchange.

[16] In contrast, in a synchronous protocol, procedures are used whereby this additional, time consuming transmission of electrical signals may be dispensed with, thereby improving

15. When remote access data processing employing remote terminals with computers was developed, because this teletypewriter equipment was readily available (often incorporating the needed modulators/demodulators, or "modems", and interface to transmit over common carriers' voice circuits), it became common for computers to support the ASCII/RS-232-based asynchronous protocol for remote access by teletypewriters and teletypewriter-like devices in order that the available teletypewriters could be used for this purpose. As faster or more convenient data terminal alternatives to these traditional relatively low-speed teletypewriters were developed, these devices, too, often used the asynchronous ASCII/RS-232 format, although other more efficient protocols were also developed for network communication among terminals and computers. Included among these other protocols was the X.25 protocol, infra that currently characterizes the normal interfaces to packet-switched networks.

16. The result has been that while market and technological development created the broad variety of data terminals available today many of them follow the established pattern of using or supporting the ASCII/RS-232 protocol. The distinction between a "terminal" and a "computer" has blurred, with terminals increasingly incorporating computing capabilities[17]. Contemporaneously, the small and relatively inexpensive personal computer was developed and deployed. These computers through the addition of a modem and appropriate software (or plug-ins containing hardware, software, or firmware), can serve as (or emulate) terminals when connected with other computers or terminals. Also, since many peripheral devices that might be connected with personal computers, such as printers, use the RS-232 interface, it became very common for personal

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"throughput" materially. Intermediate "buffering" (storage) is used to accumulate a block of typed information and send it forward. Memory devices to implement such storage are common and inexpensive today. But, in the 1930's when teletypewriters were first developed, such storage did not exist. Of necessity, networks and teletypewriters were designed to obviate the need for such storage.

[17] This is essentially the concept of distributed processing, where portions of processing that at one time was performed exclusively in large central computers accessed remotely by terminals with no processing capabilities have increasingly moved into the terminals themselves, and only those processes requiring accessing and updating of central data bases or greater computing capability than exists in the distributed processors, are performed centrally. An example of this might be a grocery chain's point-of-sale pricing and inventory control computing. If central processing alone were used, each cash register in each store, serving as a "dumb" terminal might have to communicate with the central computer to determine the price of each item read by a light pen at the register. The central computer could not only respond with the price, but also keep track of the sale to determine inventory requirements. In distributed processing, the store itself would have one or more "smart" terminals or computers to generate the pricing information and inventory control for the store. These distributed processors might communicate occasionally with a central computer responsible for chain-wide ordering of stock and central price updating.

computers to support the RS-232 interface, to which a modem can also be connected. For these reasons, personal computers have generally followed the established pattern of supporting the ASCII or asynchronous protocol for data communications.

17. The result of these developments is that today there are literally millions of deployed terminals, mainframe computers, and personal computers that support only ASCII/RS-232-based data communications with other such devices, or that support ASCII/RS-232-based data transmission for ubiquitous communications in addition to one or more protocols uniquely used for communications with other equipment supplied by the provider of the terminals. If there is a relatively common, non-proprietary terminal standard in use for data communications, it is this one.

18. *Packet Switched Communications.* When asynchronous data communications are carried solely on private lines or the conventional switched telephone network, the signals are passed through modems at each end of a channel to render them compatible with the carriers' transmission media. The channels simply replicate at the far end the signals received at the near end. If conventional MTS service is used, the user pays for the entire time the circuit is established, regardless of whether communications actually ensues. Thus, in a hypothetical interactive remote data access call which might last for an hour, during which actual communications might have occupied only five minutes, the user pays for an hour's communications service. If a private line is used, the user pays for full-period service, even if the line is actually used for communications ("occupied") for a much shorter period. This pricing approach by the carriers is sensible, as their costs track the channels' availability, not the occupancy of the channels by actual communications. That is, when a channel is connected for the duration of an MTS call, or dedicated to a user full-time in private line service, it is unavailable for other use during these periods; the actual communications time is irrelevant to the costs imposed.

19. With packet switched data transmission, many users can share a single digital transmission channel. Each user's data is split up into small discrete packets. Each packet has attached to it address information indicating its destination. The packets are sent through the network separately, then re-assembled at their destination. During transmission, packets belonging to one user can be interspersed among packets belonging to other users, allowing the channel to be more fully occupied than it would be if it were dedicated to a single user.

20. Because of the technology employed, packet switched services are commonly priced differently than circuit switched and private line data

transport.[18] It is common for various VANs' and enhanced service providers' packet switched offerings to be priced wholly or largely based on actual communications time (occupancy) rather than connection time. In the hypothetical call lasting an hour, if actual communications occurs only during five minutes of that time the user is charged primarily or exclusively for the five minutes of usage, and not for the hour of connection time.[19,20]

21. The X.25 interface protocol is an internationally recognized interface between packet switched networks and packet mode terminals. Some packet networks also use this protocol internally to their networks, while others merely generate the X.25 interface at their nodes. However, when vendors began to develop and deploy packet switched networks in the mid-1970's, they recognized that the majority of existing terminals and computers that might use such networks used the asynchronous interface, not the synchronous X.25 one. Thus, they built into their systems packet assembler/disassembler devices ("PADs") with inherent asynchronous/X.25 conversion capabilities, that form the signals from asynchronous terminals into X.25 packets. Were the networks merely to perform such asynchronous to X.25 conversion at one end of a call, and perform the reverse conversion at the other end, the end-to-end service would be basic under Computer II because no net protocol conversion would occur.

22. However, many of the large computers with which asynchronous terminal users seek to communicate are able to accept and transmit data efficiently in the X.25 mode. A common configuration, therefore, has been that user terminals access the packet switched service using the asynchronous protocols they support; the PAD with which the terminal is connected converts the data to X.25 (or an internal network protocol) for transmission over the packet switched network; and at the other end the PAD with which a large computer is connected passes the data on to that

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[18] They need not be. Since the offering of these largely enhanced services is unregulated, the vendors may price on any basis they deem appropriate including connection time pricing comparable to that used in the MTS-type alternatives. However, an important market advantage of packet switched offerings over circuit switched and private line alternatives available from the telephone companies has been the pricing discussed here. Another, discussed below, has been terminal compatibility.

[19] A large discrepancy between channel usage (occupancy) and connection time on a data call is not uncommon. In using a remote database, for example, the user may type a few characters (usage), wait for a response (no usage while the accessed computer is processing the request), receive a response (usage), think for a while about the response (no usage), and type some more (usage), etc. Where distributed processing is involved, processing delays (during which the channel is not used) may occur at both ends of the connection.

[20] In practice, pricing practices vary. While pricing generally follows usage, connection time elements are also commonly included, but they are not the primary ones.

large computer using the X.25 protocol. When a signal thus enters the packet network in asynchronous format and exits the network in X.25 format, a net protocol conversion occurs.

23. *The VANs' and Enhanced Service Providers' Packet Switched Services.* Most current and potential vendors of packet switched services purchase underlying transmission facilities from telephone companies, although it is possible for them to construct or use alternative transmission channels. Typically, ordinary switched exchange and long distance facilities are employed by user terminals to access the packet switched networks. Private lines connect the nodes of the packet switched networks to one another. Packet switches (which are, of course, computers) at these nodes create connections between the origination and destination nodes, a function involving protocol conversion, multiplexing, and switching. Finally, the X.25 destination node is connected to the called data equipment, often a large computer, by a leased private line.

24. As noted, most underlying transmission facilities involved are leased from telephone companies. Since the VANs and enhanced service providers have not been permitted to locate their packet switching equipment within telephone company central offices, loops are required between the central offices and the VAN nodes. To receive inputs to their packet switches from "dial up" users, conventional switched telephone services are used.[21] Similarly, use of private lines to connect the nodes to form a network involves use of loops[22] to connect each node to a central office, where the loop is connected to inter-office private line facilities. If the VANs' packet switching equipment were located within the central offices of the telephone companies from whom they obtain transmission channels, they would not need to use all of these loops. Instead, necessary connections would be made using within-office wiring.

25. A VAN does not commonly send a bill to a terminal user who uses its packet switched network to access an information service such as, for example, Dow Jones News/Retrieval (a participant in this proceeding). Rather, the charges for that use of the packet network are billed to the information service provider. The information service provider in turn includes the communications charges within its total charges to the user for the information or central processing services offered. The only communications costs which the terminal user pays directly is the charge

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[21] Thus, if a VAN wishes to be able to handle simultaneously calls from twenty terminals in a given local calling area, it will lease a block of twenty local lines, usually in rotary so that a single number may be published. Terminal users will simply dial that number, and the call is treated as any other telephone call, involving the user's local line at the calling end, the VAN's local line at the called end, and conventional telephone facilities to connect them.

[22] A "loop" is a channel, usually a pair of wires, between the telephone company's central office and a subscriber's premises.

for the local or long distance telephone call between his premises and the VAN's access node. If this is a local call priced on a flat rate basis, or one that is otherwise not priced on a fully usage-sensitive basis, the user perceives that this call is "free."[23]

26. Therefore, from the perspective of many users of information services, there is little or no connection-time pricing associated with use of the VANs' packet switched services. A user may place a one hour call or a one minute call, and if he types the same amount in both calls and receives the same information in both calls he will engender much the same charge.

B. The BOCs' Proposals to Offer Local Packet Switched Services

27. The BOCs assert that the VANs' networks use local exchange facilities inefficiently because they are designed to take maximum advantage of flat rate pricing of local calls. They say that VANs tend to locate their access nodes as close as possible to interstate private line facilities even if this means that local data calls may travel many miles through many central offices before reaching the packet network. They point out that data calls not only make inefficient use of circuit switched facilities, but also tend to last much longer than the voice calls for which the local circuit switched networks were originally designed. Increasing extensive use of local voice facilities for data transmission can thus overburden the circuit switched network, requiring new construction to avoid deterioration of service to all customers. BOCs claim that their own local packet switched networks, on the other hand, will conserve use of voice circuits by diverting local data traffic onto more efficient packet switched facilities at the earliest, rather than the latest opportunity. Thus, Pacific Northwest Bell estimates that it will spend $40 million in the next 6 years to expand the voice network to accommodate projected increases in data traffic, but that it will be able to accommodate the same increase in traffic on a local packet switched network for $22 million, for a savings to its ratepayers of $18 million.

28. The BOCs argue that they are uniquely able to bring to local data transport the efficiencies which the VANs have brought to long-haul data transportation through the use of packet switching. However, like the VANs and BOCs realize that the overwhelming majority of existing terminals and especially the personal computers which would be used by most residential and small business users of data services, use asynchro-

[23] Local calls in some areas, and most long distance calls, are priced on a fully usage-sensitive basis, under which the user pays based on the duration and the distance of the call. In other areas, local calls are priced on a partially usage-sensitive basis, for example, pricing per-call without regard to duration. Finally, there is flat-rate local service pricing, where the user pays the same regardless of the number, duration or distance of calls made in the exchange service area.

nous protocols. The central computers with which those terminals would communicate, on the other hand, use the X.25 protocol. Thus the BOCs wish to include asynchronous/X.25 protocol conversion in their packet switched services to make them useful to the large number of customers with asynchronous terminals.

29. Under Computer II, the BOCs are of course, free to offer enhanced services, including such protocol conversion, through a structurally separated affiliate. That affiliate would have to obtain underlying communications channel services from the carrier on a tariff basis, just as the VANs and enhanced service vendors do today. The BOCs would have to locate their protocol conversion equipment outside their central offices under the structural separation, just as the VANs or enhanced service vendors today. On the other hand, no waiver or special approval by the Commission would be required if the BOCs were seeking to offer protocol conversion in the same manner as the existing VANs and enhanced service providers.

30. The BOCs however, claim that if they must provide local data service under the same conditions which apply to the VANs, they will be forced to configure their networks like those of the VANs and to charge prices similar to those charged by the VANs. They would thus miss many benefits they see flowing from a local packet switched data network. Rather, they seek to take advantage of potential economies unavailable to the VANs and other enhanced services providers by integrating protocol conversion equipment with basic packet switching facilities located in operating company central offices. Such mingling of basic and enhanced services is not permitted to carriers subject to structural separation under Computer II.

31. In addition to seeking waiver of the requirement that they provide protocol conversion only through a separate subsidiary which complies with the conditions set out in Section 64.702(c) of the Commission's Rules, the BOCs also seek, in varying degrees, to have us treat their packet switched services, including the protocol conversion feature, as basic service. All wish to avoid the requirement that carriers using their own transmission facilities to provide enhanced services obtain those transmission facilities under tariff. Some ask, in addition, to be allowed to offer protocol conversion under tariff rather than on an unregulated basis.

III. Standards for Analysis of the Petitions

32. In this section, we describe the procedural and substantive standards we are applying to the petitions.

A. Procedural Standards.

33. We are presented here with similar waiver requests from a number of operating companies. Conceivably we could have conducted a

series of separate proceedings to determine the merits of each individual petition. Instead, in order to utilize more efficiently the limited resources of both the interested parties and the Commission we chose to treat all of the petitions in a single proceeding. This procedure produced a record upon which the many issues common to all of the petitions could be identified and then consistently resolved.[24] Our use of notice and comment procedures similar to those used in rulemaking, and our consolidated disposition of the common issues, do not mean that we have not given attention to the individual merits of each petition. Indeed, as the parties make the further showings required to meet the conditions we are placing on these waivers, the waivers will be particularized appropriately to each company's circumstances.

34. While this proceeding on petitions for waiver is not a rulemaking one, we have employed procedures comparable to those required for informal rulemaking. Comments and responses were solicited on the petitions. The staff sought additional information from the petitioners in part based on the comments that were filed, and comment was solicited on the responses filed by the BOCs. Many informal letters and comments were filed by interested members of the public throughout the course of the proceedings, and these have been associated with the files of this proceeding and considered in reaching its results. Finally, ex parte presentations were made to the Commission and its staff by interested members of the public, both parties and non-parties to the proceeding. We required each maker of such ex parte presentation to comply with the provisions of Section 1.1201 *et seq.* of our rules as if this were an informal rulemaking proceeding, to ensure that the substance of the presentations would be available as a matter of public record. The documentation of such presentations has also been associated with the files of this proceeding, and considered in reaching its results no differently than other informal comments that were filed.

35. In sum, we have gone to great length to ensure that the procedures we have employed are fair; that the interested public would have a fair opportunity to be heard; and that the respective views of the petitioners, their supporters, and their opponents, would be fully appreciated and addressed in our resolution of the requests. The Administrative Procedures Act does not prescribe a specific procedural format for informal adjudicatory procedures such as this waiver proceeding. It is the responsibility of the agency to employ procedures which ensure creation of an adequate record to support the results it reaches, and we have done

[24] This treatment is consistent with our authority to conduct our proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice, 47 U.S.C. §154(j). See, *e.g.* United States v Storer Broadcasting, 351 U.S. 192 (1956); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

so here. All arguments made have been carefully and fully considered and are, we believe, met in the result, even though we have not mentioned explicitly each of the many thoughtful comments received, nor elaborated on every variation of each argument.[25]

B. Substantive Standards

36. In our *Protocols Decision*, we thoroughly examined the nature of protocol conversion and its relationship to the goals and requirements of Computer II. We noted that the Computer II classification of enhanced services was predicated on two different types of offerings: those that are generally thought of as processing of data (the second and third major clauses of Section 64.702(a) of the rules), and those that involve relatively simple alterations of subscribers' transmitted electrical signals (the first major clause of Section 64.702(a) of the rules, i.e., protocol conversion). 95 FCC 2d at 585. We acknowledged that even when the enhanced service definition was adopted,[26] we recognized that a rigid treatment of all forms of protocol conversion as enhanced services, requiring full structural separation, could be problematic, as the structural limitations on inclusion of protocol conversion within carriers' communications facilities could impede *communications* efficiency. We noted, however, that the record of Computer II supported the inclusion of protocol conversion generally in the definition. 95 FCC 2d at 585-87.

37. In the *Protocols Decision*, we clarified that "protocol conversion" as used in the Computer II rules does not reach "network processing" in carriers' networks (setup, takedown and routing of calls or their subelements). We resolved to treat favorably carriers' requests to perform protocol conversion to maintain existing services where new technology (and different electrical signals) are employed to implement them (e.g., deployment of digital loops to implement traditional MTS).

38. The merits of retaining or dispensing with structural separation of other protocol conversions (such as those at issue herein) were less clear, however, and we adopted principles under which requests of this nature would be analyzed. 95 FCC 2d at 594-96.

[25] For example, much discussion in the comments filed on the BOCs' responses to the staff's information requests addressed claimed infirmities in the petitioners' proposals to allocate and account for the costs of functions sought to be performed on an unseparated basis by the telephone companies. Our decision below is not to waive the structural separation requirements for these functions unless new convincing showings are made, thereby obviating the need to address in any detail these arguments.

[26] *See* Final Decision, 77 FCC 2d at 422, n.37 ("In the near future we will consider a Notice of Inquiry to examine in detail the implications of forbidding all protocol translation ... and whether the public interest requires some exceptions to this prohibition.") We instituted the Communications Protocols proceeding shortly thereafter. Notice of Inquiry, 83 FCC 2d 319 (1980).

39. First, we concluded that protocol conversion to create internetworking interfaces (e.g., creation of the X.75 interface for interconnection of packet switched networks) would be treated more favorably than other forms of protocol conversion, particularly where such interfaces cannot be created effectively except in integrated facilities.[27,28]

40. Second, we resolved that waivers to permit protocol conversion in collocated facilities will be conditioned on the carriers maintaining the availability of unconverted service comparable in price, quality and conditions of service to that built into the offering to be associated with protocol conversion.[29] This unbundling requirement was intended to serve the multiple goals of ensuring: (1) that the carriers' protocol conversions would merely be an option available to users, and not a limitation on their ability to perform conversion differently or more efficiently (or to avoid it totally); (2) that general offerings of underlying services of utility to broad classes of users would remain available, and not be customized to a limited class of users' or manufacturers' equipment; and (3) that any necessary regulation of the underlying basic offering would be facilitated by ensuring that it remains priced separately from optional protocol conversion associated therewith.[30]

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[27] Protocols Decision, 95 FCC 2d at 590-94. Subsequently, we considered the merits of the requests of various BOCs to create the X 75 internetworking packet switched network interface without structural separation, and granted them authority to do so. Since this interface in many circumstances would have been used only internally in Bell System facilities had there been no divestiture of the BOCs from AT&T, and would therefore have been an internal element of a basic service under the Computer II definition when it was adopted (pre-divestiture), we resolved to treat this interface as an element of basic service. Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide Certain Types of Protocol Conversion Within Their Basic Network. FCC 2d FCC 84-561 (released November 28, 1984). See Final Decision, 77 FCC 2d at 421-22 aff'd on recon., 84 FCC 2d at 57-60; Protocols Decision, 95 FCC 2d at 585, p.2 (consistently holding that protocol conversions performed wholly within communications facilities but not manifested at the outputs, are not within the enhanced services definition).

[28] This factor is not seriously argued in the context of asynchronous/X.25 conversion requests as it is the X.75 internetworking interface, and not asynchronous conversion, that facilities interconnection of BOC packet switched networks with those of others. As noted, the BOCs have been authorized to create the X.75 interface on networks otherwise using the X.25 Protocol Id. It may be noted that in view of our treatment of the X.75 interface as part of basic service grant of waiver to allow asynchronous/X.25 conversion also permits asynchronous/X.75 conversion as well.

[29] This principle was adhered to in the context of the X.25/X.75 waiver, X.25-to-X.25 service remains generally available.

[30] As will be discussed, the BOCs' showings on this point are deficient with respect to the inter-office transmission channels proposed to be used with their protocol conversion offerings (if we grant the requested waivers), and for this reason we adopt appropriate conditions to achieve the desired results.

41. Third, we resolved to focus with particularity on specific proposals, to ensure that protocol conversion alone, and not subscriber interaction with stored information or information processing (the second and third major clauses of Section 64.702(a) of the rules), is involved.[31]

42. And fourth, we indicated that we would be prepared to act more favorably on requests for waiver in circumstances where the performance of the basic network can be improved materially only by provision of protocol conversion in the network, and not where others can do so outside the network.[32] We exemplified a favorable circumstance by the X.75 to X.25 internetworking interface, which cannot be created effectively except when integrated with a packet switch; we exemplified a less favorable circumstance as conversion to facilitate communication among large numbers of users' disparate terminals.[33]

43. In sum, the *Protocols Decision* accepted the premise that led to institution of the protocols inquiry, that inflexible treatment of protocol conversion could impair communications efficiency, and it proceeded cautiously on that premise to establish a framework for analysis of specific proposed changes such as those before us.

IV. Principal Contentions of the Parties

A. The BOCs' Contentions.

44. The BOCs are not contending that asynchronous/X.25 conversion cannot be performed in their own or others' facilities that are not collocated in central offices. They cannot do so. Various VANs and enhanced service providers have been providing such conversion on a separated basis, no differently than the BOCs would do if they conformed to the requirements of Computer II, for some time — in some cases for approximately ten years. Rather, the BOCs contend that through collocation the BOCs can perform such conversion materially more efficiently than the existing providers, leading to lower communications costs to the public and further development of "information age" data communica-

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[31] The BOCs have adequately demonstrated that they are seeking solely to include protocol conversion in their central office facilities, and not other forms of enhanced services.

[32] As is discussed below, various parties today offer asynchronous/X.25 conversion outside the network. Thus, the BOCs and their opponents argue herein about whether collocation of asynchronous/X.25 conversion in central offices will improve the communications offerings "materially."

[33] It is unclear whether this circumstance arises in the context of the BOCs' request to perform asynchronous/X.25 conversion. Communications will not be facilitated "among" large numbers of users' disparate terminals, as might be the case if communications "among" large numbers of users' terminals using different protocols were to be supported. The "large numbers of terminals" involved will not be disparate; they will use the asynchronous protocol. Communications would be facilitated here from users' terminals operating on the asynchronous protocol, to a much smaller number of terminals operating on the X.25 protocol.

tions-based services. Since many such services involve fixed costs that are recovered from their users, the more users who employ them the lower the charges to each user. Thus, it is argued that promotion of the further development of markets for such services will benefit all: the existing users' charges will decline, and new users will receive the advantages of using such services.

45. All of the petitions claim that there would be collocation efficiencies. Many of them claim additional cost saving if Computer II structural separation requirements in addition to the facilities collocation bar were also relaxed, e.g., saving of overhead if telephone company employees could support the asynchronous/X.25 services in addition to telephone services. However, there was considerable ambiguity as to just what costs would be avoided if waivers were granted. The staff therefore requested estimates of the ultimate cost savings the BOCs would achieve if they offered packet switched services with associated asynchronous/X.25 conversion if the waivers were granted, as compared to costs they would experience if it were denied. Some petitioners did not respond explicitly to this request.[34] Those that did estimated that savings could range around forty percent.[35,36]

46. The savings claimed were in three principle categories. First, local loops connecting a central office with separately located protocol conversion equipment (or combined conversion and packet switching equipment) would be avoided through collocation. Instead of such local loops, intra-office wiring would be used to achieve connections with the exchange facilities. Second, inter-office circuits connecting the central office-located packet switching facilities would be acquired by the BOCs at the costs

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[34] For example, Pacific Bell offered no cost avoidance data on the ground that it does not plan to offer protocol conversion through a separate subsidiary, and therefore it had not developed a cost study for such an offering. Response of Pacific Bell, p. 33 (August 24, 1984) Southwestern Bell did not respond in percentage terms and offered only a preliminary estimate that the avoided costs amount to approximately $24 per customer per month. Response of Southwestern Bell, p. 47 (August 24, 1984). And Northwestern Bell failed to answer this and many other questions, averring that it had "not at this time actually architected a packet network with sufficient specificity to respond to the majority of the questions posed." Letter to Jack D. Smith, Chief, Common Carrier Bureau, from Northwestern Bell. (August 24, 1984). We treat Northwestern Bell specially below, in view of its unique failure to make an effort to answer the staff's request.

[35] *E.g.*, thirty-four percent (BellSouth) and fifty percent (Bell Atlantic). NYNEX estimated 19 percent savings without use of DOV technology (see ¶53, *infra*,) and 42% with use of DOV. Ameritech claimed a 70% savings, a third of which it attributed to use of DOV.

[36] Our disposition of the petitions in this order does not depend upon estimates or quantification of the cost savings available. Therefore, the failure of a number of petitioners to come forward with data of this nature is not fatal. Nevertheless, in view of the unique failure of Northwestern Bell to proffer *any* data, on this or other points, relief will be denied that company in this order.

reflected in their regulatory accounts, essentially at net book cost. Comparable facilities acquired by fully separate Computer II subsidiaries would be acquired at tariffed rates, which are considerably higher than net book. And third, efficiencies would result if certain functions to support an asynchronous-compatible packet switching offering were performed by telephone company employees that can perform other duties. Under the modified form of Computer II structural separation applicable to the BOCs, many of these functions would be required to be performed by separate employees of the Computer II subsidiary, absent a waiver.

47. Price benefits in addition to those resulting from pure cost avoidance were also claimed by the BOCs. A number of the petitioners argue that existing packet switched services are directed primarily towards large business communications and not towards the mainly untapped market for data communications by small business and residential users. They note that because VAN pricing has tended to be distance-insensitive, and since the VANs' networks are long distance ones, their prices for even relatively local calls made over their networks has averaged-in costs of long distance facilities that the local caller does not use.[37] Since the BOC networks will be relatively local, their prices for relatively local data communications should be lower, reflecting the absence of long distance facilities.

48. Another claim made by several BOCs is that if the waivers were granted, they would offer service in sparsely-settled areas, whereas the VANs have concentrated their offerings in major metropolitan areas and have left users in other areas unserved by affordable packet switched services.[38] These BOCs propose to locate concentrating equipment in their

[37] Several BOCs have gone further and claimed that the VANs provide primarily long distance services, and not the relatively local ones the BOCs propose to provide, and that therefore the two groups would not be competing in the same market. The VANs have responded that a significant part of their business is relatively local. We need not decide which claims are correct. Given the distance-insensitive nature of current VAN pricing, information service providers connected with their networks today can use a single centralized computer to serve the entire nation, including access by those in proximity to such a computer and those at a considerable distance from it. If the BOCs offer significantly less expensive local communications, the information service providers might deploy multiple computers around the country. Thus, portions of this "long distance" market might be readily converted into a "local" one. Conversely, such a decision might change if the VANs responded with distance-sensitive rates. In any event, it is clear that the VANs' current distance-insensitive rates of necessity cause a higher price to be charged to relatively local communications over their facilities than would be the case if distance-sensitive pricing were employed.

[38] Telenet responds that it currently offers dial-up access in 146 of 166 local access and transport areas (LATAs) in the United States while Tymnet claims to offer dial up access in 169 LATAs. These figures, while undoubtedly correct, can be somewhat misleading. A user of a VAN service dials the VAN switch as a conventional telephone call, and pays

central offices in the sparsely-settled areas to aggregate asynchronous digital transmissions from these areas. They would bring this aggregated traffic on inter-office circuits to more heavily-used packet switches. In essence, these access concentrators, which include PAD and statistical multiplexer devices, would be located in areas that will not have enough traffic to justify the deployment of full packet switches. They would serve as "satellites" of the more heavily used packet switches located elsewhere in the BOCs' service areas.[39] Such a technique is by no means limited to the BOCs. The VANs and other enhanced service providers can similarly deploy such satellite facilities in sparsely-settled regions. But, the BOCs claim that the VANs have not chosen to serve such markets effectively, while they will.[40]

49. Finally, the petitioners make overall claims that allowing asynchronous/X.25 conversion capabilities to be built into or collocated with central offices promotes the general objectives of the Communications Act of making services "widely available at reasonable charges", a universal service objective. These claims have two dimensions. First, it is claimed that packet switching technology is desirable for many forms of data transmission, and broader deployment and use than currently will promote communications efficiency. The ability to perform asynchronous/X.25 conversion is portrayed as an essential precondition to BOC deployment of ubiquitous local packet networks. Second, it is claimed that as we move further towards an "information age" where data communications will become as common as today's voice communications, universality of data service will become as important a policy objective as universal voice service is today. Unregulated offerings of VANs and enhanced service providers need not be universally available, and may be limited to a chosen few. The BOCs, as universal voice service providers, will

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exchange or long distance rates for such a call. If the VAN switch is located in the user's exchange, such a call will cost little, or may be treated under flat rate local service pricing. If the VAN switch is at another location in the LATA, the call might be an expensive long distance one. In addition, as explained by Tymnet in informal presentations to staff, some sparsely-settled areas are served by means of Inward WATS or FX Service. Tymnet passes on to users in those areas its additional costs for these forms of access.

[39] For the purposes of this decision, we treat such "satellites" no differently than full packet switches. They are connected with the telephone exchange no differently than a packet switches, and they use inter-office channels no differently than a packet switch.

[40] One of the questions posed by the staff in its information request asked when the BOCs would propose to serve these lower traffic areas, since it appeared from the petitions that they were planning to serve primarily metropolitan areas initially, not sparsely-settled ones. The responses varied. The BOCs with service areas encompassing primarily rural areas, such as Pacific Northwest Bell, indicated that they would serve lower traffic areas earlier than did, for example, New Jersey Bell, which serves a small densely populated area.

similarly strive to be universal data transport providers.[41]

50. *Comments of the BOCs' Supporters*. A number of current and potential information service providers made formal and informal filings supporting the BOCs. Their contentions are simple. Those that today use the VANs' offerings (and in some cases their own private lines) for remote access by customers to their services believe that these means have been more costly than might be the case if the BOCs could participate directly in establishing packet switched connections between the information service providers' customers and the information services. These commentors support the BOCs' contention that the information services markets have not been fully tapped, and that less expensive communications will lead to less expensive information services, resulting ultimately in broader availability and use of such services by the public. Companies which would like to provide or participate in local offerings of services such as home banking, meter reading, and provision of locally-oriented data bases go further, arguing that truly local data services will never be possible unless the BOCs can provide the cheap, ubiquitous services they are promising.

51. One manufacturer of packet switching equipment that is affiliated with a carrier in Canada, Northern Telecom, argues strongly in support of the BOCs.[42] It notes that somewhat analogous issues have arisen in Canada where, in the absence of a Computer II treatment of protocol conversion as an enhanced service, there is no legal obstacle to associating protocol conversion with basic services. Bell Canada has been permitted to offer unconverted and asynchronous/X.25 packet switched data communications services under tariffed prices that reflect the respective operational efficiencies of both modes of transmission on a packet switched network. Northern Telecom acknowledges that the purchase price of packet switching equipment that does and does not incorporate asynchronous/X.25 conversion capabilities is virtually the same. It goes beyond this, however, and notes that when such equipment is used it is used more efficiently if asynchronous/X.25 conversion is not being performed on a call. Thus, Bell Canada's pricing of the two types of service reflects a not-insignificant surcharge on the rates for underlying X.25/X.25 transmis-

[41] This argument is made more explicitly by those BOCs that propose that we treat asynchronous/X.25 conversion as a basic service. *See, e.g.*, NYNEX Petition (April 27, 1984). If it were basic, under conventional regulatory obligations it would have to be made generally available without unreasonable or unjust discrimination, thus the offering BOCs could not pick and choose their customers as the unregulated offerors may do.

[42] Certain of Northern Telecom's principal points, as an expansion of comments previously filed, were made orally and documented in subsequent informal letters. Thereafter, they were confirmed in letters filed by BellSouth.

sion if a call involves asynchronous/X.25 conversion.[43]

52. Both Northern Telecom and BellSouth argue that this Canadian approach has not impeded the evolution of terminal design from the present less efficient asynchronous communications interfaces towards more efficient synchronous ones. Users and manufacturers clearly perceive a price advantage to use of synchronous equipment because of the differential in packet switched transmission pricing of the two modes. They are continuing to develop and use synchronous terminal devices notwithstanding that ubiquitous asynchronous-compatible transport services are available in Canada because of the asynchronous/X.25 conversion capabilities of the Canadian network.

53. *BOC Responses to Information Requests on the Relationship of the Petitions to DOV and ISDN.* In its information request, the staff asked the BOCs to relate their pending petitions to two changes in exchange technology that it was informed various BOCs were considering for implementation in the relatively near future: data over voice ("DOV") technology and integrated services digital networks ("ISDN").

54. DOV technology recognizes that while conventional telephone loops are normally used for nominal 4 KHz. bandwidth voice services, the actual bandwidth of these loops is considerably greater than this. When DOV is employed on these loops, the additional bandwidth of the underlying loops is used to carry one or more data channels in addition to the conventional 4 KHz. telephone one, on a "piggyback" basis, between the subscriber's premises and the telephone company's central office. A multiplexing device at the subscriber's end creates the additional channel(s) on the loop, and a demultiplexing device at the central office end separates the additional channel(s) from the voice one. The voice channel can then be routed to the circuit switch while the data channel(s) can be connected to a packet switch. In this manner, a subscriber can use a single loop to conduct both voice and data communications at the same time.[44]

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[43] *See*, Letters from Theodore D. Frank to William J. Tricarico, January 16 and January 17, 1985; Letter from Roger Burge to Albert Halprin, January 23, 1985; Letter from Roger Burge to Albert Halprin, February 19, 1985.

[44] One BOC, Southern Bell, is currently offering the use of DOV channels for data communications as a part of local area data transport ("LADT") service. The particular Southern Bell offering is the subject of a pending petition for declaratory ruling in which the petitioner, IBM, claims it violates the requirements of Computer II by including protocol conversion and by including as part of the regulated offering certain terminating equipment at the subscribers' premises that, it is argued, should have been offered on an unregulated basis. *See* Request of IBM for Declaratory Ruling in the Matter of Southern Bell Telephone and Telegraph Company, Revisions to Florida P.S.C. Tariff No. A29, Local Area Data Transport Service (LADT) filed June 27, 1983 (resolution pending). Although both IBM and IDCMA urge us to resolve those issues here, we decline to do so. Rather, we simply acknowledge that the offering of a DOV channel itself, exclusive of functionality that may or may not be built into its subscriber

Ameritech and NYNEX, which plan to use DOV with their packet switched networks, claimed in their responses to staff questions that technological limitations make it infeasible to use a DOV channel to access any packet switch other than the one in the telephone company central office.

55. Several BOCs, on the other hand, made clear that they would not seek to foreclose use of DOV channels to access others' packet switched services. Bell Atlantic proposed making available to other vendors of packet switched services dedicated access concentrators to aggregate DOV traffic, and transmit that traffic to the other vendors in concentrated form. This would allow economical access by subscribers to other vendors' services over DOV channels. BellSouth indicated that it could, through special assembly, provide DOV access to another vendor's packet switch.

56. ISDN raises somewhat similar issues. ISDN is an evolving concept being planned largely in international forums, and in various nation's national standardization forums that support these nation's contributions to the international ones. Certain ISDN planning approaches have been adopted by the CCITT in the form of recommendations. *See, Integrated Systems Digital Networks* (ISDN), FCC 83-373 (August 10, 1983); *Integrated Systems Digital Networks* (ISDN), 98 FCC 2d 249, 84-131 (April 2, 1984). ISDN planning will continue during a four year period that began with the CCITT's Plenipotentiary Meeting in September, 1984 when the current recommendations were adopted, and these recommendations may evolve further. Nevertheless, certain concepts appear to be relatively stable at this point.

57. The overall concept of ISDN is to take the DOV approach some steps further. As noted, DOV "piggybacks" an additional channel (or additional channels) on existing conventional telephone loops. ISDN integrates the conventional telephone services with additional communications capabilities in a unified framework that includes the use of three subchannels on ordinary subscriber loops.[45]

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premises or central office terminations, is a basic service no different that the offering of any other channel.

[45] In ISDN, a conventional loop will carry two "B" channels of 64 kb/s bandwidth, and a "D" channel of 16 kb/s used either for communications with the network, or for end-to-end communications. The "B" channels may be used for conventional switched voice telephone services or for packet switched or dedicated services, under control of the "D" channel which is used to setup connections on the "B" channels. For example, in today's conventional telephone services the dialed number is sent on the same channel that will be used for voice communications after a call is established; in ISDN, the dialed number (called party address) is sent on the "D" channel separately from the "B" channel that will be used for voice communications after the call is established. Also, the "D" channel may be used itself as an end-to-end communications channel, typically for data communications. Alternative loop configurations have been planned for subscribers that

58. As noted, para. 55 *supra*, some BOCs' responses to the staff's questions on DOV indicate that there are approaches under which DOV capabilities could be used for access to other telephone companies' data communications services or to those of others, whichever the subscriber desires. It is unclear, however, whether such an approach would be feasible in an ISDN. Certainly, ISDNs implemented in telephone companies' exchanges could be used to access others' local or long distance networks *in tandem* with the ISDN facilities in the exchange, but it may not be technologically feasible for the ISDN subchannels to be connected to another service vendor's facilities except after having traversed at least some of the switching and channelization capabilities anticipated in ISDN planning to be located in the exchange carriers' exchanges. While this may be a potential competitive ramification of ISDN, neither the BOCs nor their opponents argued explicitly about this potential result, nor whether it will present a problem.

59. For example, functionality to be built into ISDN will include the ability to select circuit-switched, packet-switched or what might be deemed "channel switched" connections of one or both of the "B" channels to be created on most users' loops, through call setup signals to be exchanged over the "D" channel. Circuit-switched connections are akin to today's switched telephone service: the dialing information informs the network of the desired destination of a call, and a channel is established from origin to destination for the duration thereof through equipment that selects and dedicates to the call physical channels during its duration. Packet-switched connections establish the equivalent of such channels, but they are not dedicated: any packet to be sent during the course of a given "call" may follow a different physical path than any other. "Channel switched" connections in principle would be comparable to the circuit-switched ones, but they would be set up and maintained for longer periods than the duration of a single call. For example, traditional full-period private line services could be configured on such a basis with the channel-switched connection remaining for a service ordering period, typically one or more months. Even if it is desirable for the BOCs' and others' packet-switched services to remain competitive in such an environment, circuit-switched or channel-switched access to others' packet switched services through the exchange carriers' facilities may adequately promote such competition even if packet-switched access to their

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have a multiplicity of loops to their premises, typically for private branch exchange services where multiple incoming and outgoing switched voice calls are to be handled. In such cases, high bandwidth loops that can carry 1.544 mb/s overall are configured with twenty-three "B" channels and a single "D" channel to control their use in incoming and outgoing call service.

services would require use of some portion of the BOCs' packet switching facilities in tandem with those of others, rather than *in lieu* of them.

60. A more difficult potential problem is raised by the fact that the "D" channel has been planned to have two capabilities. First, it is to be used to control the use of the "B" channels (i.e., to set up circuit-switched, packet switched or channel switched connections thereof); this use raises no problems not addressed in the previous paragraph. Second, it is to be used optionally itself as an end-to-end packet switched communications channel (in essence, by setting itself up as a channel, rather than the two "B" channels). In such use, the very facilities that accept and utilize the control signals will also be the packet switching facilities. Others' services could only be accessible in tandem with these packet switching facilities.

61. We need not, and will not, decide these potential competitive and policy issues raised by ISDN in the context of the petitions now before us. The potential issues raised by ISDN-like integration are not before us yet, as ISDN will not be implemented for several years. In the rulemaking proceeding that we will soon institute, we intend to address them, to ensure that an appropriate framework is in place when (and if) ISDN is proposed to be deployed.[46]

62. Another ramification perceived by the staff was that if ISDN is to be implemented in the relatively near future, it might be undesirable for the telephone companies to engage now in significant investment in incompatible packet switching facilities that might soon be "stranded". Thus, the staff also asked whether the facilities the BOCs might implement if the waivers were granted could be used in the future if ISDN were to be implemented. Here, the BOCs noted that ISDN planning has generally recognized that wholesale abandonment of existing non-ISDN facilities is not feasible in the United States or in other nations and that transitional approaches are being considered for compatible evolution towards ISDN. The BOCs are confident that while their planned packet switched networks will not be physically integrated into IDSNs, they will be needed well into the 1990s and will be fully depreciated before they are ultimately replaced by ISDNs.[47]

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[46] To ensure that the waivers we are granting, *infra*, will not prejudge ultimate disposition of these issues in the event that ISDN implementation proceeds more expeditiously than is currently anticipated in the United States and worldwide, we are expressly limiting these waivers to existing switching and loop technology and to the DOV technology. Asynchronous/X.25 protocol conversion is not authorized under this decision within ISDN loop facilities used for subscriber access in ISDN, without prejudice to further Commission action on this matter.

[47] In granting the waivers, *infra*, we require that the investment and expenses associated with protocol conversion be removed from regulatory accounts. Thus, even if these capabilities are "stranded" in the future, there will be no effect on rates for basic service. Conversely, while the facilities for unconverted packet switching service itself

B. Opponents' Contentions.

63. The VANs and other existing providers of data communications services incorporating asynchronous/X.25 conversion generally oppose the BOCs' petitions. IBM also opposed the requests.[48] The opponents argue that Computer II drew the proper line between what may be collocated in the BOCs' central offices and what may not. While the *Protocols Decision* may properly have acknowledged that not all protocol conversion should be treated rigidly, it also established useful standards for evaluating what flexibility should be accorded. In their view, these standards have not been met by the BOCs in their requests to collocate asynchronous/X.25 conversion in their central offices.[49] They also oppose waiver of other Computer II structural separation requirements, and strenuously object to treating asynchronous/X.25 conversion as a basic service.

64. Telenet and others agree with the BOCs' contention that packet switched service is not a viable offering unless it includes protocol conversion. They insist, however, that the logical conclusion to be drawn from this is that packet switched services should be treated as enhanced services in their entirety. They urge us to require that the BOC packet services be offered only by the Computer II affiliates.

65. The VANs view the proposed use by the BOCs of inter-office communications channels at net book cost as wholly inconsistent with the goals of Computer II. They point out that Computer II requires *all* carriers offering enhanced services to acquire facilities at the tariffed rates which apply to the VANs and others. In the view of the opponents, the very fact that such an approach was proposed substantiates the wisdom of the Computer II separation requirements that automatically

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could be "stranded" the dollars involved are far lower than those invested in present exchange facilities that also would be "stranded" if there were incompatible growth of ISDN. Regulators and carriers will have to confront the major problem if it arises. Treatment of the far smaller dollar amounts potentially involved in packet switching need not drive resolution of this issue should it arise; and, based on the assurances of the BOCs that compatible evolution will occur, it likely never will arise.

[48] IBM has various interests. It is a computer and data terminal equipment manufacturer and an enhanced service provider. It manufactures communications equipment (itself and through its affiliate, ROLM Corporation), and through its partial ownership of a specialized common carrier, Satellite Business Systems, it has a direct interest in the regulatory treatment of enhanced services generally and in the competitive and policy implications of our action on the waivers.

[49] In contrast, the petitions also requested flexibility in the treatment of X.25 to X.75 conversion, and while the opponents have opposed grant of the asynchronous/X.25 conversion requests, they did not oppose grant of the X.25/X.75 conversion request because these standards were met for the latter.

ensure that such disparate pricing is not possible.[50]

66. Furthermore, if the BOCs may collocate in their central offices asynchronous/X.25 conversion, they will use wiring in the office to connect such equipment to the exchange switches and to inter-office circuits,[51] while others that are not permitted similarly to collocate must use more costly local loops for this purpose. Initially, the VANs had argued that if waiver were granted, they too should be permitted to collocate equipment in the central office, in order to be able to acquire the same types of connections at the same prices as the BOCs. However, they also argued that the savings to be gained through collocation are far smaller than the BOCs believe them to be. Tymnet noted that the total cost of local access accounts for only nine percent of its overall costs of doing business.[52] IBM performed its own analysis of collocation savings and came up with six to nine percent.[53]

67. The staff requested information form the BOCs on whether collocation of others' equipment might be feasible. In response, the BOCs uniformly and strongly opposed making collocation available to others.[54] In the face of this strong opposition, Telenet subsequently argued that if

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[50] In the absence of a waiver, the BOCs may only offer enhanced services, including asynchronous/X.25 conversion, through a separate affiliate that receives communications services no differently than any other subscriber, i.e., at tariffed rates. If inter-office communications channels are made available to the VANs by the BOCs, under such a structure they may be used to support the BOCs' enhanced services only on an identical basis.

[51] In the previous paragraph, they address the inter-office circuits themselves, which are used no differently regardless of whether the packet switching equipment is located in a central office or elsewhere. Here, they address the connections *between* the packet switches and those inter-office circuits and connections *between* packet service nodes and the carriers' telephone facilities. These groups of connections are different if there is collocation. The connections are relatively short wires within the office if there is collocation, while they physically are normal telephone loops that leave the office and are connected to another premises if there is no collocation.

[52] Comments of Tymnet, Inc., (Oct. 2, 1984) at 38.

[53] Comments of IBM (Oct. 2, 1984) at 20.

[54] The BOCs' responses raised a number of administrative, operational and security problems which, while not insurmountable, appear to justify our not ordering them at this time, and in the context of their asynchronous/X.25 conversion petitions, to make such an approach available. Our failure to do so in this context is without prejudice to our addressing this issue in the future. Furthermore, the BOCs' views on this may change. One of the effects of the technological revolution in telecommunications in the past two decades is that older electro-mechanical central office switches increasingly are being replaced by much smaller electronic ones, resulting in the freeing up of considerable central office space which is now unused. If collocation were permitted, presumably there would be a charge to others for use of such space, and a collocation offering potentially could become a new source of profits to exchange carriers. Thus, they may well have a motivation themselves to change long-held views against collocation, in their own self-interest.

the petitions are to be granted, transmission rate parity should be established between intraoffice wiring to be used by the BOCs and the relatively short local loops to be used for comparable purposes by the VANs, perhaps through an averaging approach. It was acknowledged, however, that this would nullify an efficiency that otherwise could flow from such collocation, namely, substitution of presumably less costly intraoffice wiring for local loops.

68. The VANs argued that the BOCs claims that lower costs would flow from a grant of the petitions, and that the public would enjoy lower data communications prices than currently, were impermissibly vague and did not constitute the type of cost/benefit analysis required for a Computer II waiver. The staff requested information from the BOCs on the particular savings that would flow from a grant of the asynchronous/X.25 petitions, and on related cost apportionment and accounting procedures that would be employed to ensure that the enhanced services would properly bear their costs, and concommitantly that subscribers to basic service would not improperly subsidize the BOCs' enhanced service offerings.

69. Telenet and Tymnet thereafter analyzed the BOCs' responses. They maintained that many of them still disclosed insufficient information to determine whether there would, or would not, be improper cost shifting. Citing an even more serious problem, they contended that those BOCs which had supplied accounting plans were proposing to underallocate significant costs to their enhanced services. In particular, they argued that marketing costs, which they say will be at least 25% of the total costs of a packet service, would be shifted disproportionately into regulated accounts under some of the accounting plans.

70. IBM's objections in formal and informal comments, while tending to support the principle ones of the VANs, were also directed to two other issues. First, IBM opposes any treatment that might reclassify asynchronous/X.25 conversion (or other protocol conversion except, perhaps, conversion to an intermediate internetworking protocol, e.g., X.25/X.75 conversion) as a basic service. In IBM's view, the existing definition draws a proper line between regulated basic services and unregulated enhanced ones, and it does not wish to see this line eroded, independent of whether structural separation of the enhanced services may be waived. Consistently with this view, it supports the Telenet position espoused here (and in other proceedings) that the entirety of packet switched services should be treated as unregulated enhanced services.

71. Second, IBM argues that the petitions should be denied as unnecessary in the long term and as disruptive of desirable terminal design evolution. In IBM's view, today's data terminals and computers can be adapted to conformance to synchronous protocols such as X.25

with relative ease, either through modification of existing software and/or hardware, or through use of external equipment. In many cases, external modems (or additional plug-in cards) are already required for such terminals to communicate using asynchronous protocols. "Smarter" modems incorporating asynchronous/X.25 conversion could be sold in the future at little more cost than modems without such conversion capabilities. The cost of including such capabilities is primarily a fixed one associated with masking new integrated circuits and developing programming for them. If many units are produced, the per-unit cost of such capabilities would be minimal. IBM acknowledges that few such devices exist today,[55] but it argues that if we hold fast on the present Computer II separation requirements, such equipment will be designed and deployed in the next few years.[56] Conversely, IBM argues that if we grant the petitions and asynchronous-compatible packet switched services are deployed ubiquitously by the BOCs, present incentives to develop such devices will be diminished, and the efficiencies of broadscale synchronous communications will not be realized.

72. More broadly, IBM argues that asynchronous/X.25 conversion can be accomplished either in centralized facilities shared by a multiplicity of terminals (e.g., by the VANs today in their packet switched network PADs, or the BOCs if they deploy similar capabilities with or without structural separation) or in data terminals, and that where such conversion is to be located should be determined competitively in the marketplace. If the existing Computer II structural separation is maintained, the BOCs' centralized conversion capabilities will be priced based on costs comparable to those sustained by others, including the VANs and other enhanced service providers. In IBM's view the "competition" between such centralized conversion and conversion at the terminals will be fair. If such separation is dispensed with, IBM argues that the BOCs' centralized conversion offerings may compete unfairly with terminal-based conversion because of potential improper cost-shifting, and the advantages of terminal-based conversion (if it otherwise were to "win" such competition") would not be realized.

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[55] One that has been identified in informal comments costs about $595.

[56] In informal comments, IBM quantified the fixed cost of adding such X.25 conversion capabilities to a modem at approximately $10 to $15 million. If all of today's over 10 million personal computers were to purchase such devices, the additional cost would be about one dollar per-unit. Since simple low-speed 300 baud modems today cost about $50 to $150, and the simple 1200 baud modems more commonly used for business applications (and increasingly for non-business applications) today cost about $250 to $500, it can be seen that even if IBM's numbers are off by an order of magnitude, potentially the additional cost still is not very significant.

IV. Discussion

A. Introduction.

73. We start with several overriding principles. First, our purpose is to promote the public interest objectives of the Communications Act. The procompetitive and deregulatory policies of Computer II, and its structural and other safeguards, were not adopted for abstract purposes. They were adopted in the belief that they best would promote these objectives. We were fairly absolute in the Computer II decisions that deregulation of terminal equipment, and deregulation of information services (the second and third major clauses of Section 64.702(a) of our rules), would promote these objectives. We were less absolute in our treatment of protocol conversion. Even when protocol conversion was first included in the definition, we concluded that flexibility could be required in the treatment of protocol conversion by carriers subject to structural separation to ensure that the efficiency of communications — a primary objective under the Communications Act — is not unacceptably impeded. *See*, 77 FCC 2d at 422, n.37.

74. Second, fair and effective competition best achieves the purposes of the Act in this and other areas. Others have offered asynchronous/X.25 conversion services for some time. Entry by the BOCs could enhance competition, and its benefits, in such offerings. We note that the BOCs are free to do so on a basis similar to that of these other firms today, without any Computer II waivers, but they have not chosen to do so. Rather, they have sought to offer such service on a basis that is not presently available to others, through equipment collocated in central offices that does not require loops between the central offices and remotely-located equipment, loops that are required by the existing vendors of such services. In these circumstances we must be vigilant to ensure that we do not, through a sanctioning of improper pricing or unwarranted disparate treatment by the BOCs of the loop and inter-office facilities used for their own and others' enhanced services, distort or adversely affect the competition that now exists for data communications services (and in the terminal market where, as argued by IBM, there is increasingly "competition" between terminal-implemented protocol conversion and centralized protocol conversion).

75. This is a particularly difficult matter. Clearly, the proposed treatment by the BOCs of their inter-office circuits is unwarranted, and, as is discussed below, is inconsistent with the principles adopted in the *Protocols Decision.* There are no efficiencies in the BOCs' proposed use of these circuits over the existing uses of them by others. The *same* circuits are to be used. All that has been proposed is disparate pricing: net book if they are used by the BOCs, and higher tariffed rates if used for

comparable purposes by others.[57]

76. However, the within-office wiring that can replace local loops if packet service nodes are collocated in the central offices may well represent a true economic efficiency. Installation, repair and use of short wires in the central office is probably less expensive than longer ones (i.e., loops) between the central office and a VAN's or enhanced service vendor's premises.[58] Denial to the BOCs of the ability to realize such efficiencies may promote the ability of others to continue to offer packet switched services at prices comparable to those of the BOCs (i.e., if these efficiencies were destroyed through an averaging technique), but it would result in BOC data communications prices to the public that are higher than they would be if such economies were reflected. For this reason, an approach that might average the costs of loops actually used by others with the within-office wiring to be used for comparable purposes by the BOCs is problematical. We decline to do so herein, but note that the conditions we are adopting will ensure that only true cost differences between the loops and within-office wiring will be reflected.

77. Third, the actual proposals now before us are for implementation of packet switched services within the central offices that are largely no different than those of the VANs and enhanced service vendors. The BOCs would use PADs and similar devices obtained from essentially the same suppliers as those that the VANs and enhanced service vendors use. They would functionally connect them with the telephone facilities no differently than the VANs and enhanced service vendors do (except that within-office wiring would replace certain local loops required by others, as discussed *supra.*). However, in addressing these petitions we cannot ignore the technological trends in telecommunications. Packet switching is heading rapidly for integration with facilities for conventional telephone service. We probably can treat the present proposals independently of the state and federal regulatory treatment of conventional telephone service. We cannot realistically do so when both groups of services are integrated, given that local exchange telephone service and use of local exchange facilities for interstate access presently represents a near-

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[57] We foreclose such disparate pricing *infra.*

[58] But, the reason this efficiency is not available to others is that the BOCs do not propose to allow others to collocate in their central offices, not that the BOCs propose to offer an intrinsically more efficient service. Also, it must be emphasized that within-office wiring is not without cost. The conventional telephone facilities to which such wiring is connected are used the same whether a loop leaving the building or within-office wiring is connected to them. Installation and related expenses associated with making such connections similarly do not depend on the length of the wire connected. The real differences would appear limited solely to the cost of the wires themselves, and to the fact that installers need not be dispatched to another premises, and sustain travel costs, to complete installation of the premises end of a loop elsewhere.

monopoly. *See generally*, Bypass of the Public Switched Network, FCC 84-635 (released January 18, 1985). To do so might lead to premature deregulation of conventional telephone services not because there is effective competition therefor, but because they are to be integrated with packet switching technology. DOV represents a first step towards such integration; ISDN potentially represents its culmination.

78. For this reason, we must resist in the context of addressing the pending waiver requests the Telenet approach of treating the entirety of packet switched services, including those that involve no end-to-end protocol conversion, as unregulated enhanced services. Packet switching can be used, and is used, to implement conventional switched and unswitched basic telecommunications services. The addition of an asynchronous/X.25 conversion option, that may or may not be selected on a given call, does not change this. Shortly after Computer II was adopted, we gave VANs and enhanced service vendors offering their services on a resale basis the option of treating both unconverted and protocol-converted offerings as unregulated enhanced services. In a subsequent Bureau order, *In the Matter of Tymnet, Inc. and GTE Telenet Communications Corp.*, #3018, released March 18, 1983,[59] we made clear that this was only an option, not a requirement. Under this order, Telenet and Tymnet were permitted to maintain tariffs on file for the unconverted offerings that might be made on their packet switched networks, notwithstanding that offerings involving protocol conversion also were made outside of these tariffs. Similarly, in our *Basic Packet Switched Service* ("BPSS") decisions[60] we squarely rejected the notion that packet switched services involving no end-to-end protocol conversion must be treated as unregulated enhanced services.

79. As is developed below, we believe that there are sound reasons not to treat unconverted X.25/X.25 packet switched services as unregulated at this time, and we treat this offering as basic; but this is not an immutable decision. We will soon adopt a notice of proposed rulemaking in which we revisit the general treatment of protocol conversion under Computer II, and this will be an issue to be addressed in that proceeding. The treatment we are adopting herein is one to be employed *pendente lite*, and is fashioned to maintain our options in the rulemaking proceeding and to ensure that certain conditions we are adopting are carried out.

80. And fourth, there is validity to the arguments of IBM, Northern Telecom and BellSouth that there are differing efficiencies associated with packet switched services involving no protocol conversion, packet switched services involving asynchronous/X.25 conversion, and alternative terminal designs implementing the asynchronous or X.25 interfaces.

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[59] This order is reproduced in Appendix B of this decision.

[60] AT&T (BPSS), 91 FCC 2d 1 (1982); AT&T (BPSS), 94 FCC 2d 48 (1983).

Given that packet switched communications overall is more efficient if the asynchronous format is not used in conjunction with such communications, we will not allow the BOCs ubiquitously to deploy asynchronous-compatible packet switched data communications services priced no differently than ones using the X.25 format. To ensure that others' protocol conversion offerings (be they in terminals, or centrally located) can be compared with those of the BOCs, we adhere to the "unbundling" principle of the *Protocols Decision* which required that protocol conversion options be priced separately from the underlying basic services, and we require the impact of protocol conversion on the basic X.25/X.25 service to be reflected in the pricing of the latter.

B. Decision on the Petitions

81. We conclude generally that the BOCs have adequately demonstrated that the public interest would be served by allowing them to provide asynchronous/X.25 conversion in facilities collocated with their central offices. In areas where the VANs and existing enhanced service providers are currently offering comparable services, the benefits to the public of additional competition by the BOCs will be enjoyed, particularly in view of the conditions we are adopting to ensure that the BOCs' competition will be fair and not at the expense of subscribers to regulated services. Moreover, the BOCs propose, if the requested waivers are granted, to offer such services in areas that are not effectively served by existing vendors. Subscribers in such areas, and those that might wish to engage in efficient data communications with them, will receive the direct benefit of receiving such service for the first time from the BOCs.

82. Provision of such services by the BOCs promises to bring to the public lower prices for asynchronous format-compatible packet switched service than are available from existing providers of such services. There are efficiencies (and concommitant lower costs) that can be translated into lower prices when certain loops involved in these services are replaced by shorter wires. In the absence of the waivers, the BOCs would have to use loops, and could not employ within-office wiring. While we discuss below how some claimed "efficiencies" are merely pricing disparities, and we condition against maintenance of this disparate pricing, other claimed efficiencies seem real. In our view, the public should not be denied their benefit.

83. More importantly, provision of such services by the BOCs at the first central office to which an end-user is connected promises real efficiencies over time in the use of exchange and interexchange facilities, and will make unnecessary additional construction of facilities, the costs of which would raise local telephone rates. "Bursty" data communications today are inefficiently carried on circuit-switched telephone facilities,

whether those facilities are used for end-to-end communications, or to access the packet switched facilities of a VAN or other enhanced service vendor. A circuit-switched circuit is tied up and unavailable for others' use for the entire duration of a call, even if actually used for a small percentage of the connection time. Furthermore, data calls typically have durations far longer than the average ones for voice communications. Since current facilities are designed to handle peak loads based on average call durations, the increasing volume of lengthy data calls must be met with new construction or service quality will drop for both data and voice users. The record herein demonstrates that this effect is already occurring, and will accelerate in the future.

84. The BOCs argue that this need not and should not occur. If packet switched data communications facilities are available to which this type of traffic can be diverted, far less investment in additional facilities will be needed to transport the data.[61] Since, however, the overwhelming majority of current data terminals are asynchronous, there will be little diversion of data communications from circuit switched to packet switched facilities, unless the BOCs can efficiently and effectively interface with asynchronous-format traffic at the first central office accessed by these terminals. The packet switched services of the VANs and others mitigate this problem only to the extent that their ports connect to the same central office as their users' terminals. In most cases, however, they have a central port in each region they serve, particularly in regions where there are large exchange service areas. Every call accessing their packet switched facilities is carried inefficiently through multiple telephone company central offices and the inter-office facilities that connect them. These inefficiencies must ultimately result in additional construction and higher local telephone service rates. We conclude that the public interest reflected in our statutory mandate would best be served by ensuring that such inefficiency is avoided.

85. An additional basis for concluding that the waivers should be granted is provided by the BOCs' argument that "information age" enhanced services have not grown because communications costs have not been sufficiently low. The BOCs argue that if the communications costs inherent in these services drop, demand for these services will grow. Since many of the costs of these services are fixed, vendors can then drop unit prices to the public while maintaining adequate profits, further stimulating demand until a new equilibrium is reached. Larger segments of the public will receive the benefit of such "information services" and existing

[61] Pacific Northwest Bell, for example, estimates that it would cost $40 million to grow the circuit switched network to meet future data transmission demands, as compared to $22 million needed to accommodate those demands on a packet switched network. Reply Comments (June 11, 1984) p. 25.

users thereof will have lower prices. Moreover, since these services tend to be more efficient than the manual information retrieval or other services they can replace, general efficiencies that can propagate through the economy will be created and encouraged. While this argument is speculative, common sense indicates that it is possible that it is correct, and we accordingly weigh such potentially desirable results in assessing the public interest herein.

86. In this regard, it should be noted that while we conclude that the waivers should be granted, we do so on certain conditions. One of these is that the inter-office circuits the BOCs will use to support their packet switched services must be made available to the VANs and other enhanced service vendors on the same basis as used by the BOCs. If the BOCs are correct that lower prices can stimulate market growth to the benefit of the public, they will have strong incentives to promote the growth of their own packet switched services by bringing down the prices of the circuits. Because of our requirement for equal treatment of the other service vendors, the benefits of this will be available to the other service vendors as well.

87. Whether or not the BOCs' proposed offerings are more efficient than those of the VANs and other enhanced service vendors, there is a strong likelihood that the BOCs' offerings will be less expensive than those of others because their facilities will be more local. A VAN's offering unquestionably can be used for relatively local communications. However, the VANs have constructed nationwide networks that include costly long distance circuits. Since they have generally employed distance-insensitive pricing, users of relatively local transport defray part of the costs of the long distance circuits. In contrast, the BOCs are proposing to construct relatively local networks only. Indeed, under the present constraints of the MFJ, they cannot offer interLATA services. Thus, the BOCs' facilities will be less costly, and their use for relatively local data transport can be priced lower than comparable uses of the VANs' facilities.[62] We conclude that the potential benefits to the public of this support a grant of the waivers.

88. And finally, we approach the waivers more broadly under our statutory mandate to promote the wide availability of "rapid" and "efficient" services. Under our Computer II rules and decisions, asynchro-

[62] This effect is not limited to the BOCs. Anyone is free today to offer a relatively local enhanced service that similarly uses only relatively local facilities, but we are not aware that such services are available. Existing service providers are also free to employ distance-sensitive pricing that similarly would cause relatively local transport not to sustain the costs of long distance facilities, but they presently do not do so. The BOCs argue that a market for such transport exists and can be stimulated, but is presently not served by vendors focusing on it. In part because of the MFJ restrictions, the BOCs are willing to develop such a market.

nous/X.25 conversion is an enhanced service, but it has a direct and immediate nexus with communications itself. It is clear that communications efficiency, and the efficiency of many goods and services produced in our economy, can be promoted by ensuring that a technology that can be deployed to create efficiencies in communications is so deployed. The limitation in Computer II on deployment by certain carriers in their central offices of processing that implements enhanced services was not intended to foreclose overall efficiency. It was intended to promote competition that itself would create efficiencies to counter-vail those that might be lost by limiting such deployment. On balance, and in view of the record of this proceeding and the conditions we are adopting, we conclude that this broader goal of Computer II will best be served by granting the waivers as is done herein.

C. Application of Protocols Decision Principles

89. We now apply specific principles of the *Protocols Decision*, under which requests of this nature are to be analyzed, to the petitions before us. First, since an intermediate internetworking protocol is not involved here, the main portion of the first principle of the *Protocols Decision*, 95 FCC 2d at 594, is irrelevant. Conversion of user terminal protocols is not the type of protocol conversion that would ultimately be limited in use to a few other carriers or enhanced service vendors, even if the X.25-compatible terminals could be considered "few" in this context. Ultimately, there will be many more X.25 terminals than presently, and we conclude that these petitions should not be treated under the *de minimis* principle of the *Protocols Decision*, *Id.*, n.13. On the other hand, the second portion of the first principle, that the underlying basic offering remain a truly general one, will be satisfied. Not only do the BOCs propose to offer standard X.25/X.25 unconverted packet switched data communications services;[63] but also, via our "unbundling" conditions *infra.*, we are requiring that inter-office channels and subscribers' loop access remain available generally and unencumbered.

90. Second, the BOCs' showings under the second (unbundling) principle of the *Protocols Decision* are deficient. Underlying transparent transmission facilities that are "comparable in price, quality and conditions of service to [those] built into the offering to be associated with protocol processing" are not available generally. The BOCs propose to

[63] The related concern, adverted to at 95 FCC 2d at 595, n.14, that protocol conversion could be tailored specifically for a given supplier's terminals, giving that supplier (or a BOC, if it were offering that supplier's terminals) an unwarranted advantage over others, does not arise here. The asynchronous protocols that the BOCs seek to support through asynchronous/X.25 conversion are the most common and ubiquitous ones available in the data communications market. It is precisely for this reason that the BOCs seek to support them.

build into their offerings the use of inter-office channels at a preferential price that will not be available to others. They give limited, if any, assurances that subscribers accessing BOC protocol conversion capabilities and subscribers accessing those of the VANs will do so on a comparable basis. They argue that the X.25/X.25 unconverted packet switched service is "the" underlying basic service for this purpose, and that the rates for facilities that are used to configure it should, therefore, not be unbundled any more than are other inter-office and loop facilities used to complete conventional telephone calls. For example, they note that just because inter-office channels are used to complete conventional local telephone calls between adjoining exchanges, use of these channels is not unbundled; their book costs are aggregated in the revenue requirements that determine rates for local calling. They argue for a similar treatment here.

91. This argument might have validity if the use of monopoly local exchange facilities by competing BOC and VAN packet services followed the familiar pattern set by long distance companies in their use of the local exchange. As long distance competition has evolved, most competitors have used monopoly exchange area switching and inter-office circuits *in tandem with* their long distance facilities. Under these circumstances, material concerns have not arisen about possible anticompetitive effects of allowing the BOCs to bundle the costs of inter-office circuits into their rates for basic local exchange service. All competitors receive local exchange service on the same terms, and under the MFJ, the BOCs providing that service are not themselves using the local circuits to compete in the long distance market.

92. When the existing packet service vendors began ten years ago to deploy their networks, there were no local packet networks analogous to the local exchanges used by the long distance companies for local access. The VANs therefore developed networks which included both local and long distance components. The BOCs, who until now have played the role of wholesalers supplying circuits needed to complete the VANs' networks, now wish to use those circuit to create services which would compete at the retail level with the VANs' local services. Those BOCs which appear to acknowledge the anticompetitive effects of allowing BOCs to pay lower prices for these circuits than those paid by their competitors candidly state[64] that they envision their local packet services as monopoly local data exchanges operating in tandem with the VANs and others' long distance packet services.[65]

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[64] See, *e.g.*, Reply Comments of Pacific Northwest Bell (October 23, 1984) at 8; NYNEX Petition for Declaratory Judgment, or Waiver (April 27, 1984) at 2.

[65] Since, under the MFJ, the BOCs may not offer interLATA communications, for interLATA data communications their local packet switched networks would have to be

93. We are not now prepared to acquiesce in an interpretation of our rules which allows the BOCs to use their monopoly position as the supplier of inter-office circuits to enter a currently competitive market and then unfairly eliminate local competition.[66] In analogous circumstances, when we determined not to apply structural separation to the one-way paging operations of wireline carriers, we recognized problems that could arise in areas where radio common carriers' paging services competed with those of the wireline carriers. We stated that, to avoid price squeeze effects, we would require any wireline carrier providing paging service to fix its charges to radio common carriers for wireline facilities on the identical basis that it uses to compute its own costs for its own paging service.[67]

94. Likewise, because disparate pricing of inter-office channels can directly affect competition between the BOCs and the existing packet service providers, and, importantly, with no gain in efficiency (since the *same* underlying communications channels are involved), we must require that these channels be available to others on a basis comparable in price,

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interconnected with services or facilities of an entity that is permitted to offer interLATA service. In many cases, such interconnection would be to a long distance packet switched network, using the X.75 intermediate internetworking protocol. In this type of service, the analogy to current forms of exchange access where local transport and switching costs are aggregated (without unbundling of inter-office circuits) in determining access rates would be more apt; here, the local exchange facilities would be used in tandem with the long distance ones. But, intraLATA end-to-end enhanced services are also possible and are provided over the networks of the VANs and other enhanced service providers. In such cases, use of the BOCs' packet switched facilities would be unnecessary, and aggregated pricing of the inter-office circuits when used in conjunction with the BOCs' packet switched services, but not those of the others, would be disparate.

[66] *See, e.g.*, United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945). More recently, the The Supreme Court ruled in Federal Power Commission v. Conway, 426 U.S. 271 (1976) that the FPC (now FERC) must consider, in setting wholesale electric rates, whether the rates it sets will interact with state-established retail rates to create price squeeze opportunities. Since that decision, price squeeze doctrine has been used by municipal utilities challenging the regulated rates charged by their suppliers. *See, e.g.*, Boroughs of Ellwood City v. FERC, 731 F.2d 959, 968-975, (D.C. Cir. 1984), and cases cited therein. FERC and the courts have evolved tests for determining whether a particular pair of wholesale and retail rates, just and reasonable in themselves, combine to create a price squeeze. *See id.* at 969. In the present context, however, we need not perform elaborate tests on proposed rates to determine whether the BOCs proposals could lead to a price squeeze. The BOCs themselves have averred that if they must acquire their inter-office circuits at the going wholesale price, that is, at the tariff price paid by the VANs, they themselves will not be able to offer packet service at the low retail prices which they propose and which they claim are necessary to stimulate the market for local data service. This is a price squeeze and, in our judgment, an inappropriate, anticompetitive use of their monopoly control of local exchange facilities.

[67] First Report and Order in Docket No. 80-183, 89 FCC 2d 1337, 1346 n.17 (May 13, 1982); *Cf.* Mobilefone of Northeastern Pennsylvania v. FCC, 682 F.2d 269, 272 (D.C. Cir. 1982).

quality and conditions of service to that of their use by the BOCs in configuring their packet switched networks, as a condition on the grant of the requested waivers. This requirement does not depend upon whether the X.25/X.25 packet switched service is considered "the" basic one underlying the asynchronous/X.25 protocol conversion offering, or whether only the inter-office circuits themselves are so considered.[68] Because of the special considerations involved in the competition that will be facilitated between packet switched services of the BOCs and those of others that under present circumstances depend on the BOCs' inter-office circuits, we shall require this form of unbundling even if the X.25/X.25 unconverted packet switching service might otherwise be thought of as "the" basic one.[69]

95. An additional dimension of the unbundling requirement of the second principle of the *Protocols Decision* is that the protocol conversion itself must be priced separately. We explained that this requirement would maintain the ability of others to perform protocol conversion themselves, 95 FCC 2d at 595, and that it would facilitate any necessary regulation of the underlying basic service, *Id.* at n.14. These goals are particularly important here, given IBM's assertion that unwarranted action on the petitions could arrest present trends in terminal design towards more efficient synchronous terminals. Use of such terminals is an alternative to centralized protocol conversion, and is, therefore, a form of "competition" with both the centralized asynchronous/X.25 conversion capabilities of the existing VANs and enhanced service providers and with those the BOCs wish to provide.

96. As noted, it has been argued that if there were no price differential between the X.25/X.25 service used by a terminal communicating in the X.25 format and the asynchronous /X.25 service which would be used by most existing data terminals, neither users nor manufacturers would have significant incentives to substitute X.25 terminals for asynchronous ones. Even if the X.25 terminals are more efficient, manufacturers would have little incentive to sustain the "up

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[68] The second principle of the Protocols Decision was never so limited. It addresses "underlying transparent transmission facilities" (which these circuits undeniably are) being made available in a matter comparable to those "built into the offering to be associated with protocol processing." These circuits will be "built into" the BOCs' packet switched offerings to be associated (via the waiver) with asynchronous/X.25 conversion.

[69] We address in the next section of this decision how this requirement might be satisfied by the BOCs. In formulating the second principle we stated that "we will require that if any waiver is to be granted, it be granted solely on condition" (to be imposed by this agency) that the underlying capabilities be generally available. We thus did not explicitly require an affirmative showing by the petitioners, but only indicated the nature of the conditions we would adopt. Thus, the failure of the BOCs to indicate how this principle will be served is not fatal. We can and will cure this deficiency through the adoption of appropriate conditions.

front" costs of producing new terminals (or convertors for existing terminals) when they could continue to earn profits using existing designs. If they were nevertheless to produce such products, the benefits that users would perceive might be so limited that they would not choose to sustain the additional expense of purchasing such equipment. IBM's view is that widespread use of X.25 terminal equipment would rapidly bring down the per-unit costs, since large fixed costs would be spread among the units produced. If users did not start to purchase them in large numbers, however, the per-unit costs would remain high. Were this the sole basis for a differential price, it would not be justifiable on policy grounds.

97. However, the record indicates that there is a cost basis for establishing an economic price difference between X.25/X.25 service and asynchronous/X.25 service. The additional investment cost of acquiring PADs that incorporate asynchronous/X.25 conversion capabilities, as compared with those that might not, might well be perceived by the BOCs as virtually zero, since only PADs with such capabilities are generally available in the market.[70] As was explained by Northern Telecom in informal comments herein, however, there are cost differences in the operation of a packet switched network that occur when the PADs are, or are not, used in the asynchronous/X.25 conversion mode.

98. Northern Telecom's analysis is complex, and depends upon whether or not users will accept delays in through transmission, a perception that in part depends upon the speed of transmission. The essence is that the processors implementing a packet switched network node have finite capacity, and more of that capacity is utilized by ports requiring asynchronous/X.25 protocol conversion than by ports not requiring such conversion, leaving less capacity available to handle communications at remaining ports. If asynchronous/X.25 conversion is proceeding at a port carried on that processor, less capacity remains available for handling transmissions from the other ports carried on the processor than would be the case if no asynchronous/X.25 conversion were being performed. Since the nodes have storage capabilities, and can also shut off an originating terminal when such storage is full through X-ON/X-OFF flow control (if the terminal supports flow control), transmissions from the other ports

[70] We do not accept the implication that therefore there is no investment cost associated with protocol conversion. Such capabilities do exist in virtually all PADs on the market, but they did not arise at no cost. Capital was expended to create such capabilities when the PADs were designed, and a detailed cost analysis could, at least in theory, identify separately the costs of such capabilities. In treating the requirement that the costs of the PAD associated with protocol conversion be removed from regulatory accounts, *infra.*, we suggest two bases for determining the proportion of the PAD investment that is related to protocol conversion. Our discussion in the next three paragraphs, however, addresses an *operational* cost difference, not an investment one.

may not be lost if processing capacity is taken up by protocol conversion at other ports, but they will be delayed. The result is a lower "throughput" of data on such ports than would be the case if protocol conversion were not being performed at other ones. In sum, communications efficiency is reduced for the users of all the terminals seeking to use the node simultaneously and for the packet switched network as a whole, when asynchronous/X.25 protocol conversion is being performed.

99. Specifically, Northern Telecom indicated, in a worst case analysis, that at 9600 baud its SL-10 processors could handle five asynchronous ports (i.e., with protocol conversion) as compared with thirty synchronous ones (i.e., with no protocol conversion) simultaneously.[71] Thus, in this worst case each asynchronous/X.25-converted input to the node reduces the potential communications capabilities of the node six times, a clearly less efficient result than would be the case if the node carried only synchronous (unconverted) communications. Stated another way, all other factors being equal a port used in the asynchronous/X.25 conversion mode is equivalent to six ports used in unconverted mode, worst case. This difference could conceivably justify a six-fold increase in the pricing of the switching component of a packet switched service in the protocols conversion mode, over the unconverted mode.

100. Northern Telecom indicated that this concern was weighed in by Bell Canada when it set its tariffed rates for packet switched data communications services that do and do not involve protocol conversion.[72] Its tariffed rates for asynchronous-compatible packet switched service are as much as fifty percent higher than for X.25-format service, according to an analysis submitted by BellSouth.[73] BellSouth asserted that there has been no adverse effect on the development of synchronous terminals in Canada under this pricing approach. We conclude that a similar technique is an appropriate one for us to employ here to achieve this second goal of the unbundling requirements of the *Protocols*

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[71] A "port" in this context is a single end-user connection to the packet switch. A "node" is the group of such ports at the location of the packet switch, the packet network's "node".

[72] In Canada, which has not adopted the Computer II treatment of protocol conversion, there is no impediment to the tariffing of protocol conversion, and it is treated there no differently than a basic service. Thus, conversion from asynchronous to X.25 protocols is treated as a separate element in Bell Canada's transport tariffs, to be applied in addition to the X.25/X.25 transport element if such protocol conversion is used.

[73] Also, it should be noted that the switching cost component is but one component of the costs of providing packet switched service. Other major components would include the costs of the circuits between these switches and the overheads associated with the offering. Thus, a given percent differential in overall pricing may reasonably reflect the much higher differential in expense that could be justified in pricing the operation of the switches alone (as noted, as much as six to one).

Decision.[74]

101. The third principle of the *Protocols Decision*, 95 FCC 2d at 595, is conformed to by the petitions. The BOCs are proposing to collocate only protocol conversion capabilities in their central offices. Their proposals involve neither processing that creates, deletes or changes information itself, nor subscriber interaction with stored information.

102. And finally, we conclude that on balance, and as conditioned below, the proposals of the BOCs will be consistent with the fourth principle of the *Protocols Decision*, 95 FCC 2d at 595-96. We concluded there that requests would be treated "more favorably" in circumstances where "the performance of the basic network can be improved materially only by provision of protocol processing in the network, and not where others can do so outside the network." *Id*. Clearly, others can and do perform such conversion outside the network, seemingly placing the BOCs' petitions in the less favored category. The VANs and other enhanced service vendors do so centrally in facilities outside the network, and terminals themselves increasingly can and will do so, also outside the network. The BOCs themselves can perform asynchronous/X.25 conversion outside the network, either as an adjunct to a basic X.25/X.25 service offered on a regulated basis, or in packet switching facilities outside the network operated by a separate affiliate no differently than the VANs and other enhanced service providers.[75]

103. However, we did not conclude that proposals falling in the less favored category would or should automatically result in a denial. Rather, we established a balancing test. In the case at hand, the balance falls on the side of the improvements potentially available to the public if the

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[74] In the next section of this decision, we describe the condition that we are formulating to reach a comparable result. It should be emphasized that we are not adopting the specific percent differential used by Bell Canada, which may be based on the characteristics of products of one manufacturer, Northern Telecom. Rather, we are adopting a more general approach.

[75] The VANs argue that Computer II appears to grant the BOCs the option of removing the entirety of packet switching service, with and without protocol conversion, from regulation. We are not as sanguine as the VANs on this point, since a major policy objective of Computer II was that innovation in communications capabilities should occur in the regulated network available to all, rather than in unregulated offerings available to a chosen few. Packet switching technology is such a technological innovation, and in our Basic Packet Switched Service decisions we concluded that AT&T's decision to include it in common carrier offerings available generally was in the public interest. In any event, we need not and do not in this decision reach the policy implications of the BOCs removing the entirety of packet switching service from regulation and offering it on a wholly separated unregulated basis. They are not seeking to do so. They are seeking to commingle facilities for the undeniably enhanced service of protocol conversion with their central offices, and in most cases to offer the X.25/X.25 service as basic.

BOCs are permitted to collocate asynchronous/X.25 conversion in their central offices subject to the conditions we are adopting herein.

104. Specifically, we conclude that the BOCs have shown that there will be a material improvement in local communications efficiency if data transport is shifted from inefficient circuit-switched uses of local exchange plant towards more efficient packet switched uses thereof. Only deployment of local packet switching capabilities can move towards this result.[76] Since the vast majority of terminals are not compatible with the X.25 format, local packet switching will not be used if the BOCs cannot deploy local packet switching capabilities that are compatible with the millions of asynchronous terminals now available. The conditions we are adopting herein are fashioned in part to seek to ensure that the VANs and other enhanced service vendors also can participate effectively in this movement towards communications efficiency. Denial of the petitions, however, would block such movement for the present.

105. Furthermore, we conclude that allowing the BOCs to provide local packet switched services, under the conditions we are adopting to ensure equality of treatment in the pricing of the inter-office channels and of access by end-users to such services, will create incentives for the BOCs to make available new, less expensive inter-office channel offerings and new subscriber loop service offerings that will foster the growth of data communications generally and "information age" data communications services specifically. We accept for the purposes of this decision the proposition put forth by various participants to this proceeding that such services may have been priced excessively. Overpricing may have inhibited growth that otherwise might have been possible. Our condition will promote such growth, to the public's benefit; and, it will ensure that existing and future packet switched service providers, including the BOCs, will participate in serving such growth, to their benefit.

106. In sum, under the fourth principle of the *Protocols Decision* we conclude that the public interest would be served by a grant of waivers of Computer II to permit collocation by the BOCs of asynchronous/X.25 protocol conversion in their central offices subject to the conditions detailed below.

D. Scope of the Waiver; Conditions.

107. In this section, we adopt a waiver of the Computer II structural separation conditions to permit the BOCs to collocate asynchronous/X.25 protocol conversion capabilities with their central offices on three primary conditions: (1) that the BOCs treat equally the inter-office communications channels supporting their packet switching services involving the asyn-

[76] As explained above, the offerings of VANs and enhanced service providers do not move toward this result; they reach the contrary one.

chronous/X.25 conversion, and those used by others; (2) that the asynchronous/X.25 conversion be priced separately in the form of a surcharge on the price for unconverted packet switched communications service; and (3) that the end-subscriber loop services that might access both groups of packet switching services[77] be available equally to users of both groups of services. We particularize this third condition for the DOV technology by requiring that any DOV services that are to be made available to the public for access to the BOCs' packet switching services be available for access to others' services on a comparably efficient basis. Each of these conditions is detailed and explained below. But first, we address the scope of the waiver we are granting, and certain information filing requirements that must additionally be conformed to prior to the waiver becoming effective.

108. *Scope of the Waiver*. Neither the *Notice of Inquiry* in the protocols proceeding nor the *Protocols Decision* itself held out the possibility of broadly dispensing with the classifications and protections of Computer II via waiver. The principles we set out therein were intended to apply to requests for waiver of the limitation on collocation at central offices of protocol conversion equipment. We contemplated neither waiver of the requirement that enhanced services be marketed by a structurally separate affiliate, nor waiver of the classification of protocol conversion as an enhanced service.

109. The BOCs, on the other hand, seek waiver of all structural separation conditions; several, indeed, go further and ask us to treat asynchronous/X.25 conversion as an element of basic service. Their showings, however, while convincing with respect to the public benefits which may flow from waiver of collocation restrictions, are wholly inadequate to justify further waivers of structural separation. We are particularly concerned with the failure of the BOCs to offer any alternative safeguards to the joint marketing prohibitions which they ask us to waive. Telenet and Tymnet, two long-standing vendors of basic and enhanced packet switched services, point out in their pleadings that marketing costs represent as much as 25-30% of the total costs of doing business for a mature packet service vendor. It seems appropriate to assume that the BOCs, who claim to be developing new markets not yet exploited by the VANs, will incur marketing costs as high as or higher than those experienced by Tymnet and Telenet. To preserve the fundamental goals of Computer II with respect to preventing cross-subsidiza-

[77] We address here only the end subscriber loops to which the data terminals themselves are connected at subscribers' premises, not the loops used by VANs and enhanced service vendors to connect their PADs and similar equipment with central offices in lieu of the within-office wiring that would be used if such equipment were collocated in the central offices.

tion of enhanced services by basic service ratepayers, it is essential that marketing costs for protocol conversion, an enhanced service, be separated from marketing costs for basic services, including basic packet switching. Some BOCs have not offered any proposals for exclusion from regulated accounts of costs for marketing unregulated services.[78] Others have put forth various formulas, some of which do not appear to guard against underallocation of marketing costs to the customers whom they expect to use their services.[79] No company has made a persuasive argument that there are any public benefits to be gained from allowing joint marketing which would counterbalance loss of the safeguards of structural separation. Because of the nature of the waivers we are granting herein, we need not address further the merits of the BOCs' filed plans. In the absence of probative additional showing, *infra*, at paras. ____ structural separation of marketing will not be waived.

110. Absent such additional showing, in this order we waive only the collocation restrictions. Incidental to this waiver we also waive the ban on joint installation and maintenance, but only to the limited extent necessary to allow installation and repair of the protocol conversion equipment itself by unseparated telephone company employees.[80] Furthermore, to ensure that subscribers to basic service do not cross-subsidize such installation and repair operations on behalf of the separated affiliate's enhanced protocol conversion offerings, we shall require that a contract be entered for compensation of the telephone company for such installa-

[78] NYNEX stated that it does not intend to utilize separate accounting procedures because protocol conversion is part of a basic service, but that it will adopt appropriate procedures if required to do so. NYNEX Responses at 11 (August 24, 1984). PNB and NWB have not offered accounting plans.

[79] Ameritech proposed to attribute to protocol conversion a portion of total operating company marketing expenses according to the ratio of protocol conversion revenues to total business and residence service revenues. Ameritech Petition, Exhibit F, p. 3 (August 8, 1984). Pacific Bell originally proposed a similar plan, then modified it in light of comments suggesting that this formula underallocated costs to protocol conversion. Pacific's revised formula applies to total packet switched service marketing costs, the ratio of protocol conversion revenues to total packet switching revenues. Pacific Bell Reply Comments, p. 23 (June 11, 1984). BellSouth proposes to track marketing costs for its packet switched services and allocate them according to the percentage of traffic which is converted or unconverted. That is, if 45% of all packets transported are converted from one protocol to another, then 45% of marketing costs will go below the line. BellSouth Accounting Plan, at 19-20 (August 27, 1984). Southwestern Bell's revised accounting plan stated that it would track costs incurred specifically for packet switching and allocate portions of common costs according to factors which it intends to identify at some future time. Southwestern Bell Reply Comments, Attachment 1, p. 9 (October 26, 1984).

[80] In view of the fact that in many cases the protocol conversion capabilities are integrated with the packet switches themselves, a contrary treatment of installation and repair would be inefficient and impracticable.

tion and repair, and that it be filed with the Commission and accepted prior to the waiver becoming effective.

111. Furthermore, we shall require each telephone company to apportion and remove from "above the line" regulatory accounts the investment and expense associated with protocol conversion. Where protocol conversion is performed in separate equipment not used otherwise for the provision of basic service, this requirement should be relatively simple to satisfy. The record, however, indicates that in many cases protocol conversion is to be performed in the same processors that create the packet switched channels and switch traffic. Since those processors are also used in providing unconverted transmission services that we are treating herein as basic, apportionment of costs may be difficult to accomplish. If the entirety of the packet switched service were treated as enhanced, apportionment would be unnecessary; the entirety of the investment and expenses associated with the equipment would be removed from "above the line" accounts. However, there is validity to the claim of those petitioners that argue that when X.25/X.25 service is being provided, all that is being provided is a basic service.

112. We do not decide here the fundamental question, raised directly by Telenet, of whether such X.25/X.25 service provided in facilities that also support the enhanced asynchronous/X.25 service (under the waivers we are granting herein) should ultimately be treated as basic. We need not decide that question here. It is clear that such service *can* be so treated, as it falls under none of the definitions of enhanced service in Section 64.702(a) of our rules. We conclude that during the pendency of the rulemaking proceeding we will soon institute, the X.25/X.25 packet switched service (and any X.75 interfaces that might be made available thereon) should be treated no differently than other basic services. This determination is without prejudice to our resolution of this issue in the rulemaking proceeding. We reach this result, which should be regarded as one *pendente lite*, for two reasons. First, it preserves the options available in the rulemaking proceeding, one of which is a proposal that the current line between enhanced and basic services be refined. And second, it provides a vehicle for making effective the conditions we are adopting on unbundling of protocol conversion. But, given this treatment, it is important that an appropriate technique be employed by the BOCs to separate from the investment and expenses associated with the PADs and other packet switching equipment a realistic portion to be removed from "above the line" regulatory accounts.

113. For this purpose, we reject the notion that the protocol conversion capabilities of the PADs were created at no cost, and that therefore their purchase prices represent no economic value for protocol conversion. It is true that PADs probably are not available for purchase by the BOCs

that do not have protocol conversion capabilities. Packet switching equipment is sold and deployed in worldwide markets where protocol conversion is treated no differently than unconverted packet switching services. Manufacturers competing on the world markets in the provision of such equipment must offer the full range of capabilities that their potential customers seek, including protocol conversion to support communications by the millions of asynchronous terminals available in other nations no differently than in the United States. The fact that the equipment is sold only with these capabilities does not imply, however, that protocol conversion capabilities were created or implemented without cost, or that such cost is not inherent in the purchase price of the equipment.

114. One technique for separately identifying the protocol conversion portion of the PAD might be to examine the actual resources available in the PAD, and to establish a ratio between the resources available for protocol conversion and X.25/X.25 (or X.75) transmission that can be applied to the overall investment and expenses associated with the PAD.[81] A second technique might be to establish a ratio based on an estimate of the nature of the traffic traversing the PAD.[82] We reach no decision on the particular technique to be employed. Each BOC will be required to make a submission that demonstrates acceptance of the conditions we are adopting below, and we shall require them each additionally to select and

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[81] PADs and packet switches, like any other processors, are implemented by software. Some of this software implements the protocol conversion involved in this proceeding; the remainder implements the packet switching, handling, routing and channel creation functions necessary to provide unconverted X.25/X.25 service. While the actual software implementing these processors ultimately is in a machine language form usable by a processor, since the functions are complex it most probably was created in a form more comprehensible to programmers, either an assembler or higher-order language. Source code for this software undoubtedly exists, to document the design and to facilitate modification or revision of the PAD functions. A ratio could be established between the source code implementing protocol conversion functions and the source code implementing X.25/X.25 packet switching functions using a gross measure, perhaps through a count of lines of code or individual commands. We recognize that such source code is ordinarily proprietary, and may well be retained solely by the manufacturers of the PADs and not furnished to their purchasers. If this technique were to be employed, therefore, we would expect the BOCs to obtain the ratios — but not the code itself — from their suppliers, perhaps through appropriate contractual provisions in their purchase contracts.

[82] That is, if 80 percent of the traffic to traverse a PAD will have its protocols converted at that PAD, 80 percent of the investment and expenses would be removed from "above the line" regulatory accounts under this approach. It would be important that a common measure of the traffic traversing the PAD be employed in establishing such a ratio, and seemingly a common measure of bits per unit time of "throughput" should be employed. This approach might have the effect of excessively reducing the amounts to be included in regulatory accounts, but it would appear to be relatively simple and without burden.

justify an appropriate technique for apportioning the investment and expenses associated with the PADs.

115. As noted, the showings heretofore made by those BOCs seeking to market asynchronous format-compatible packet switched services without structural separation are unconvincing, and we reject them. The waivers granted in this order will not permit such marketing to be done on an unseparated basis. An issue to be considered in the rulemaking proceeding we will be instituting is whether such structural separation will be required for the future, and one potential outcome is that it will not. In such event, this matter would become moot thereafter. Nevertheless, we are willing to grant the BOCs additional authority to perform marketing on an unseparated basis earlier if they make the showings required below.

116. Specifically, each BOC seeking approval of a specific marketing plan must make a probative and fully documented filing that demonstrates: (1) how the costs of marketing asynchronous format compatible packet services by unseparated telephone company personnel will be identified and excluded from "above the line" regulatory documents;[83] (2) what marketing information, if any, will be available (and on what basis) to other enhanced service vendors to give them an opportunity comparable to that of the BOCs' unseparated marketing personnel to vend asynchronous format-compatible packet switched services to the BOCs' basic telephone service subscribers; and (3) how the petitioner's marketing proposals relate to conditions #2 and #3 which we are adopting herein. Any such filings will be placed on public notice, and comment will be solicited thereupon. After an appropriate comment cycle, we anticipate that the Bureau will act expeditiously on any such filings.

117. In view of the foregoing, the concerns of the VANs and other opponents of the waiver about potential cost misallocation are satisfied. The protocol conversion equipment and its installation and maintenance will be properly apportioned under the conditions set forth herein. If any BOCs additionally wish to market these services on an unseparated basis, they will be required to demonstrate convincingly that the costs of such marketing will be separately identified, not included in revenue requirements for regulatory services, and be auditable. Finally, those cost issues not related to equipment costs or marketing are addressed in the conditions below.

118. *Condition #1: Treatment of the Inter-Office Channels*. We have already established why the BOCs must make available to other

[83] As an aspect of demonstrating separation of costs, any BOC seeking this additional waiver should explain fully the assumptions on which its proposed cost allocation formulae are based and show how it intends to test and verify the validity of those assumptions in practice.

providers of asynchronous/X.25 packet switched services the inter-office channels the BOCs will be using to support their own services, without discrimination. Under present circumstances, BOCs are monopoly or near-monopoly providers of these facilities. It appears that, in the absence of an explicit requirement of equal treatment, the BOCs may engage in a classic "price squeeze", unfairly competing at retail with those to whom they supply inter-office channels at wholesale.[84] As was emphasized previously, the same channels are to be used by the BOCs and others; all that would differ, in the absence of this condition, would be the price.

119. The vehicle for ensuring against this anticompetitive and discriminatory result is in the provisions of the Computer II decisions addressing those carriers that are not subject to structural separation under Computer II. In the *Final Decision* we stated:

> . . . an essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. Because enhanced services are dependent upon the common carrier offering of basic service, a basic service is the building block upon which enhanced services are offered. Thus, *those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms and conditions reflected in their tariffs when their own facilities are utilized*. Other offerors of enhanced services would likewise be able to use such a carrier's facilities under the same terms and conditions.

77 FCC 2d at 475, emphasis added. Although this language was clear and unambiguous, we re-emphasized the same point on reconsideration:

> Those carriers not subject to the separate subsidiary requirement, when employing their own common carrier transmission facilities in the provision of enhanced services, *must obtain transmission capacity pursuant to the terms and conditions embodied in their tariff*.

84 FCC 2d at 75, n.19. We conclude that this Computer II treatment of carriers not subject to structural separation should apply to the inter-office transmission capacity that will be used by the BOCs when providing asynchronous/X.25 conversion in facilities that are not structurally separated.[85]

120. The BOCs have argued that paying for inter-office circuits at the same private line and DDS tariffed rates that the VANs and other enhanced service providers presently pay will unnecessarily raise the prices of the BOCs' packet switched services and undermine achievement

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[84] This could change to the extent that VANs and enhanced service providers substitute their own facilities for ones obtained from the BOCs, but at present they are not doing so in a significant way.

[85] If we were to dispense with all structural separation of enhanced services provided by the BOCs, this baseline requirement would still apply. It certainly should and must apply if we are waiving only a subset of these requirements to permit collocation of asynchronous/X.25 conversion.

of the benefits of their provision of such services.[86] This may be correct if it is assumed that current private line and DDS offerings are the only offerings of inter-office channels that will ever be available. But, this need not immutably be the case. The BOCs themselves have considerable control over what offerings will be available. Consistent with the goals of the Communications Act, the Commission would look favorably upon changes in such offerings, if appropriately available, that would allow the BOCs more fully to exploit the efficiencies they might have in offering this service.

121. Carrier-initiated offerings are the norm in regulated industries, and the BOCs are free to propose new offerings that are structured to promote the growth of data communications that they seek.[87] Based on their assertions during the course of this proceeding, they have positive incentives to do so. Under the condition we are adopting here, the benefits of such new offerings will be available not only to the BOCs, but also to others. We reach no conclusions and adopt no conditions on the rates they might propose. Rather, we adhere to the Computer II principle cited above that whatever rates, terms and conditions are made available to others in the BOCs' tariffs for inter-office circuits of this nature must identically govern the uses by the BOCs of such circuits to support the asynchronous protocols-compatible packet switched services that will be marketed by their structurally separated affiliates.

122. We wish to emphasize that it is the achievement of equal treatment, and not the manner in which it is achieved, that is the subject of this condition. For example, some BOCs may be permitted under governing state or federal regulatory policies to supply inter-office circuits of this nature to the VANs and other enhanced service providers on a special assembly or special construction basis, rather than under a general tariff offering of a new service category. Availability of such supply would satisfy this condition — provided that the end result is equality of treatment. Other approaches which we do not at this time perceive may also be available. In any event, we and the public will have

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[86] This argument appears overstated. As was argued by the BOCs, their offerings would include the costs only of relatively local channels, while those of the VANs and other enhanced service providers today include the costs of long distance, and in some cases nationwide, networks even when used for relatively local communications. Thus, even if the BOCs' costs were to be raised artificially, they still would probably be far lower than those of others. Of course, this result depends to some extent on the currently-common distance-insensitive pricing by the existing providers of packet switched service, which can and may change.

[87] Indeed, there is an evolving policy, at least at this Commission, that flexibility in the pricing or private line services such as nondiscriminatory bulk discount offerings is desirable, and that flexibility in this regard should be accorded dominant carriers, including the BOCs. *See* generally, Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, FCC 84-147 (released April 24, 1984).

an opportunity to determine how a particular BOC would propose to discharge the obligation of complying with this condition. The BOCs will be required to file with us their proposed means of satisfying the condition, including sample state and federal tariffs that will offer the inter-office circuits to others on the same basis that they will be taken by the BOCs. These may be tariffs for existing or proposed services, or sample contracts if contractual approaches are available. They will also be required to file with us their proposed tariffs for X.25/X.25 packet switched service and to demonstrate that the costs of inter-office channels used in deriving those rates are based on the tariffed (or other) offerings that will be available to the VANs and other enhanced service providers. In addition, they must demonstrate that the investment and expenses related to the protocol conversion functions of the PADs (as discussed earlier) are not included in the costs underlying these rates.

123. Furthermore, we wish to clarify just what we mean when we refer to "inter-office circuits" in this context. We are referring to actual inter-office circuits implemented on wire, radio, or optical facilities (and associated equipment that terminates such circuits), not to the PADs and statistical multiplexing equipment that might be associated therewith for their use in packet switched service. The BOCs, and the VANs and other enhanced service providers, should be free to compete on how they choose to implement their packet switched services, on what mixtures of full packet switches and "satellite" access nodes might best implement their networks, and on the packet switching or related technology that they might employ. We do not wish to perturb this competition by requiring piece parts of one group of competitors' implementations thereof, the BOCs', to be made available to other service vendors except through normal network-to-network interconnection.[88]

124. *Condition #2: Unbundling; Network Utilization Rate Element.* We are adopting a second condition on the waivers. If this condition is not complied with by a petitioner, its waiver will terminate automatically. Specifically, the tariffed service of X.25/X.25 transmission must include a separate network utilization rate element to be applied to the use of any port operating on an asynchronous protocol. This element will be computed as a percentage of the usage-based X.25 transmission charge, and must be additive with the rate(s) for use of a port for X.25 transmission. Based on analyses to be submitted to this Commission, we shall specify a minimum percentage for each petitioner, and that specified percentage will be a condition on the waiver granted to each such

[88] Of course, we do not constrain the ability of the BOCs to make such capabilities available should they desire to do so, or others to take such offerings. We simply do not here *require* them to be made available.

petitioner. This condition will apply regardless of whether a tariff for X.25/X.25 service is federal or state.

125. We have discussed previously why we conclude that a condition of this nature is needed. Such pricing will properly recognize that while protocol conversion capabilities in PADS when they are purchased may not carry significant additional investment costs,[89] it does affect the operation of the packet switched network facilities themselves in a manner justifying a surcharge on unconverted transmission when the protocol conversion is performed. The Northern Telecom informal submissions on this point, and the related submissions by BellSouth explaining Bell Canada's use of a rate element reflecting the impact of protocol conversion on packet network performance and discussing how BellSouth would determine a surcharge for asynchronous use of its packet service, have not been analyzed in the record. Thus, while BellSouth's analysis, which leads to an approximate 19.6 percent surcharge on the X.25/X.25 rate for transmission, appears to be soundly based, we have no basis for concluding that the particular rate element used by Bell Canada, or the one derived by BellSouth, would be proper in all cases. Various suppliers' packet switching and protocol conversion devices may have different operational characteristics that could justify different magnitudes for this rate element. Furthermore, such a rate element might be justifiable on a distance-insensitive basis (as Bell Canada has done), but we have no reason to anticipate that the BOCs will tariff their X.25/X.25 services at distance-insensitive rates to which a simple surcharge can be applied, as suggested by BellSouth.

126. For these reasons, we are not in this decision stipulating the magnitude of the network utilization rate element. As a condition precedent to the waivers granted herein becoming effective, we shall require each BOC to make a submission to us analyzing the effect on their tariffed X.25/X.25 transmission services of performing protocol conversion at a port, and deriving an appropriate network utilization rate element based upon such analysis. We envision that such an element would be proportionate with network utilization, and that it would not be related to non-usage costs that often are recovered through fixed charges in carriers' tariffs, such as service initiation charges. By further order, we may, if necessary, establish an appropriate minimum percentage to be applied to each petitioner's X.25/X.25 tariffed transmission charges in formulating the network utilization rate element. It should be emphasized that the percentage once established will be only a minimum; each BOC will be free to set the network utilization rate element at any level it wishes so long as the level exceeds the stipulated minimum.

[89] This is the case because virtually all packet switching equipment available to the BOCs already incorporates protocol conversion capabilities.

127. Absent additional probative showings, *supra*, at paras. 115-16, it is the structurally separated affiliate and not the telephone company that will receive underlying X.25/X.25 service from the carrier under its tariffs, and will vend asynchronous format-compatible packet transport services to end-users. The network utilization surcharge will be a component of the charges paid by the affiliate to the carrier, and one of the costs the affiliate will be including in its prices for asynchronous format-compatible packet transport service. The affiliate will also be sustaining other non-zero costs that should be included in its prices, for example the portions of investment and expenses of the collocated equipment which are allocated to protocol conversion and the repair and installation expenses associated with that equipment, none of which are to be included in "above-the-line" regulatory accounts. Therefore, it may be well that the differential in prices for asynchronous format-compatible packet transport to be vended by the affiliate, and X.25/X.25 service to be offered by the telephone company, in practice will exceed the differential established by the network utilization rate element alone.

128. If a petitioner wishes to make the showings necessary for a further waiver of the requirement that the affiliate market asynchronous format-compatible packet transport, it will be free to do so. However, it must demonstrate that the result of this condition — a result that ensures a price differential between the pricing of X.25/X.25 service and asynchronous/X.25 service — will be maintained. One technique might be that the asynchronous/X.25 service will still technically be offered to the public by the affiliate, but that the affiliate could by contract compensate the telephone company for the provision of marketing service to the affiliate. Another might be that the telephone company itself would offer asynchronous/X.25 service to the public on an unregulated basis, on condition that it agree to reflect in its prices therefor the pricing differential established under this condition. We are less concerned with form than substance; it is the result that remains important.

129. *Condition #3: Access By End Users to the Packet Switched Offerings of the BOCs and Those of Others; DOV Access.* In our third condition, we address access from end users to the protocol conversion capabilities of the BOCs and those of others. This access may not be bundled with the rates for asynchronous protocols-compatible transport. It must be available on a tariffed basis, without discrimination in access to the BOCs' protocol conversion facilities and those of others. The proposals before us for collocation in the central office of protocol conversion equipment comparable to that of the VANs and other enhanced service providers, reach this result. End-users will access these collocated facilities through the dialing of a conventional telephone call (pursuant to general telephone service tariffs) or through private line facilities (again,

pursuant to tariff). But this may change in anticompetitive ways, and by this condition we foreclose such changes.

130. For example, special dialing procedures could be made available with relative ease for access by end users to the BOCs' protocol conversion facilities and not to those of others, e.g. dial "star" to access the BOCs' enhanced services but dial 7 or 10 digits (or more) to access those of others. Other forms of preferential access could also be made available, including special price "packages" of local telephone and enhanced service, or higher quality or more expeditiously installed connections. As noted, we have no basis for concluding that the BOCs in fact would seek to discriminate in such manner, but we wish to establish now that it will not be permitted. We do not by this condition foreclose the use of abbreviated dialing or other potentially desirable subscriber options; we only require that they be made available without discrimination.

131. Another aspect of this potential problem relates to the basis on which the protocol conversion equipment to be collocated in the central office will receive connections to end users. As noted earlier, we reject the notion that the pricing for such connections should be based on an averaging of the costs of within-office wires and the loops that those that may not collocate equipment in the central offices must use. Such an approach would destroy an economic efficiency of collocation and minimize the benefits thereof to the public. But, even within-office wires and terminations engender costs, many of which are identical to those engendered by loops. Since it is the affiliate that will be offering asynchronous protocols-compatible packet switched service to the public (unless the marketing restrictions are waived, the affiliate will be acquiring connections to the carriers' exchange facilities for such service. Such connections to the basic service of transporting signals from end-users' premises to the central office, and through any central office circuit switching that may be involved, should be offered to and received by the affiliate on a tariffed basis that reflects the cost of such connections (including any economies arising from within-office wiring).

132. While this obviously is the preferable approach, the BOCs may wish initially to avoid preparing cost analyses of this nature. If they so choose, they may simply take such connections under the same tariffs that govern others, although this may be less efficient than otherwise. In analogous circumstances involving central office-located connections between interstate private lines and exchange switches for foreign exchange service, carriers long utilized local business rates for the exchange connection through intra-office wiring, notwithstanding that such rates were predicated on the cost of loops that were not employed. Alternatively, if they wish to reflect any cost efficiencies that may be

involved, they must file with us prior to the waiver becoming effective both sample state and federal tariff provisions that will govern the availability of such connections and the tariff provisions that will govern comparable connections used by the VANs and enhanced service providers. These filings should be accompanied by information that identifies and justifies any differences between the two sets of rates.

133. Our concerns about potential discrimination become particularly important if and when a BOC that receives a waiver under this decision seeks to utilize DOV technology to create one or more additional channels on a "piggyback" basis on subscribers' loops. As discussed previously, there is a design option available that would foreclose effective access by subscribers using DOV facilities to the offerings of VANs and enhanced service vendors, i.e., the option of choosing to terminate the central office ends solely in the BOCs' packet switching facilities, making the DOV facilities unusable for access to VANs or other enhanced service vendors' offerings. Under the condition we are adopting here, a BOC will not have this option. End-users of DOV facilities must be able to access a VAN or other enhanced service vendor over them, at their option, on a basis comparable in price, terms and quality to their ability to access services of the BOCs' Computer II affiliates.

134. We are not by this condition foreclosing the possibility that the central office end of a DOV facility might be terminated at a BOCs' packet switch (or "satellite"). To do so would deny subscribers a potential benefit of the DOV technology. Rather, we are requiring that such termination be merely an option, and that access to others' enhanced services also be made available as a subscriber option. To ensure that VANs and other enhanced service vendors can access customers using DOV facilities for such access on an efficient basis, we are requiring not only that the connections of the BOCs' affiliates to such DOV facilities be made on a tariffed basis, but also that the offering under tariff of connections by VANs and other enhanced service vendors to subscribers' DOV facilities be comparable in price, terms, quality and efficiency to that which the BOCs' affiliates will have.

135. We believe that this result is implicit in the requirement that the BOCs' affiliates receive underlying services — in this case end users' communications over DOV-created channels — no differently than others. Since the DOV facilities will be used as an adjunct to conventional telephone service, and have not yet been deployed to any great extent, we are able to particularize our overall condition specially for DOV. Use of multiplexers and/or concentrators to bring subscribers' traffic in aggregated form to a VAN or other enhanced service provider would appear to be an appropriate way that this obligation might be discharged efficiently. Alternatively, the BOCs may simply choose to terminate all DOV facilities

in circuit switching facilities, no differently than the conventional telephone channels on which they will be "piggybacked." In such case, the subscriber could access a BOC's packet switched services (or those of its Computer II affiliate) no differently than those of a VAN or other enhanced service vendor, i.e., by dialing. Multiplexing and concentrating techniques might also usefully be employed to implement efficient connections of the existing services of the VANs and other enhanced service providers to the BOCs' exchanges, but since the BOCs have not employed them, the others' networks have not been configured to interconnect on this basis, leading to our less particularized conditions for connection to current facilities.

V. Conclusion and Ordering Clauses

136. In view of the foregoing, we conclude that the public interest would be served by our granting the subject petitions for waiver, as delineated and conditioned in this order. We are delegating authority to the Chief, Common Carrier Bureau to act on the additional filings required of the petitioners, and expect such action to occur expeditiously. Furthermore, carriers other than the petitioning ones are subject to structural separation under *Computer II* and may wish to receive authority similar to that granted herein to the petitioners. We are delegating to the Chief, Common Carrier Bureau authority to grant to other carriers, upon request, authority similar to that granted in this order, subject to the conditions adopted herein and to their making the showings required here of the petitioners.[90]

137. By our action herein we believe that we are striking an appropriate public interest balance. Subscribers will have the benefits of efficiencies promised by the petitioners (and, potentially, others similarly placed), while mere pricing disparities and other forms of unreasonably discriminatory and anticompetitive conduct will be foreclosed. We believe that such result is fully consistent with the objectives of our *Computer II* proceedings, and the statutory objectives they are grounded upon.

138. Moreover, granting the petitions should not disturb the overall goals of our Computer II decisions. It appears that the offerings which the BOCs contemplate may complement rather than displace the offerings of the VANs and other enhanced service providers. Therefore, a goal of Computer II, the promotion of vigorous competition in enhanced services,

[90] In view of Northwestern Bell's refusal to respond meaningfully to the staff's information request, its petition will be denied in its entirety. We strongly advise this company, and others, to respond in the future to requests for information. However, we do not wish to penalize Northwestern Bell's subscribers unnecessarily for the carrier's failings. Therefore, Northwestern Bell will be permitted, if it wishes, to file a properly supported new request for waiver under the procedures we are adopting herein for addressing asynchronous/X.25 waiver requests of non-petitioners.

should be furthered by our decision. In addition, the conditions we are placing on the provision of protocol conversion by the BOCs should reduce their ability to use their positions as dominant providers of local exchange service to compete unfairly in providing packet switched services incorporating protocol conversion.

139. Accordingly, pursuant to Sections 1,4(i), 4(j), 201-05, 218 and 303(r) of the Communications Act of 1934 as amended, 47 U.S.C. §§151, 154(i), 154(j), 201-05, 218 and 303(r), and Section 1.3 of the Commission's Rules, 47 C.F.R. Chapter I §1.3, IT IS HEREBY ORDERED, That the Petitions for Waiver filed by Pacific Bell, Southern Bell Telephone & Telegraph Company, South Central Bell Telephone Company, New York Telephone Company, New England Telephone & Telegraph Company, New Jersey Bell Telephone Company, Pacific Northwest Bell Telephone Company, and the Ameritech Operating Companies ARE GRANTED TO THE EXTENT INDICATED HEREIN subject to the conditions and additional filing requirements established in this order, and are otherwise denied.

140. IT IS FURTHER ORDERED, pursuant Section 5(c) of the Communications Act of 1934 as amended, 47 U.S.C. §155(c), That the Chief, Common Carrier Bureau is hereby delegated authority: (1) to act on the additional filings required in this decision; (2) to particularize the network utilization rate element condition based on such filings; and (3) to act on requests by non-petitioners for asynchronous/X.25 protocol conversion waivers.

141. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A — may be seen in the FCC Dockets Branch, 1919 M Street, N.W. Washington, D.C.

Appendix B

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Tymnet, Inc.	Transmittal Nos. 50 and 51
Tariff F.C.C. No. 3	
GTE Telenet Communications Corporation	Transmittal Nos. 42 and 43
Tariff F.C.C. No. 1	

Memorandum Opinion And Order

Adopted: March 16, 1983; Released: March 18, 1983

BY THE CHIEF, COMMON CARRIER BUREAU:

1. We consider at this time the above-captioned tariff revisions filed by Tymnet, Inc. (Tymnet) and GTE Telenet Communications Corporation (Telenet). By these revisions, which are scheduled to become effective on March 17, 1983, Tymnet and Telenet would "detariff" their service offerings which they consider to be "enhanced" under the Commission's *Computer II* decision.[1] Telenet, whose own proposal is unopposed, filed a petition to reject Tymnet's filing.[2] However, by letter dated March 10, 1983, it requests permission to withdraw its petition without prejudice to addressing the issues it has raised in light of further Commission actions which may be taken in related proceedings. In this regard, Telenet states that it agrees with the suggestion of the Association of Data Processing Service Organizations, Inc., that the issues raised by Telenet's petition here should instead be resolved in the *Digital Communications Protocols Inquiry*, General Docket No. 80-756, 83 FCC 2d 318 (1980).

2. On the basis of Telenet's request and our own review of the tariff materials submitted, we have determined that there are no questions warranting rejection or suspension and investigation of the revisions at issue. Moreover, it appears that the services which Tymnet and Telenet would continue to offer under tariff are basic. For example, as we understand Tymnet's tariff, both synchronous communications and asynchronous communications between access ports would be offered separately. Moreover, as we understand it, although

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[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982). In addition, Tymnet's proposal would revise and add several definitions to clarify existing tariff provisions; it would also add several rates for new service offerings to points outside the continental United States.

[2] Also before us is Tymnet's reply.

changes in network access transmission speed would be performed in both cases, the tariffed offering would not also include code conversions.

3. For its part, Telenet would continue to offer under tariff communications between access ports with the offering encompassing the use of several accessing protocols.[3] However, as we understand the offering, the same terminal protocol would be employed at each end of a given connection under the tariff, with no net change of protocol or code involved. Thus, this offering also appears to be basic and may also be offered under tariff.[4] Therefore, we will grant Telenet's request to withdraw its petition and will allow these revisions to take effect as scheduled.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, That the request of GTE Telenet Communications Corporation to withdraw its petition to reject IS GRANTED.

5. IT IS FURTHER ORDERED, That this Memorandum Opinion and Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

GARY M. EPSTEIN, *Chief, Common Carrier Bureau*

[3] For example, Unbalanced or Balanced Link Access Procedures using High Level Data Link framing. See Telenet Tariff F.C.C. No. 1, Para. 3.1.1(A).

[4] Of course, in the case of both carriers' services, disparate protocols may be supported, but on an unregulated or non-tariffed basis.

Separate Statement
of
Commissioner Dennis R. Patrick

In re: Petitions for Waiver of Section 64.702 of the Commission's Rules (Computer II) filed by:

Pacific Bell
Southern Bell Telephone & Telegraph Company and South Central Bell Telephone Company
Southwestern Bell Telephone Company
New York Telephone Company and New England Telephone & Telegraph Company
Northwestern Bell Telephone Company
Pacific Northwest Bell Telephone Company
Ameritech Operating Companies

The Bell Operating Companies listed above have requested that we waive the Computer II structural separation requirements to permit them to offer asynchronous to X.25 protocol conversion through facilities located within their central office. Today we find such a waiver, properly conditioned, will serve the public interest.

It has taken almost eleven months from the date of the first waiver request to reach this juncture.[1] The complexity of the issues raised by the waiver requests and the need to obtain additional information used to develop the analysis of these issues may have compelled such delay. The action we take today will necessarily result in further delay. The order we have adopted concludes — I believe correctly — that the BOCs must meet certain additional filing requirements before their separate subsidiaries may begin to offer asynchronous to X.25 protocol conversion through collocated facilities. I am concerned that this additional, albeit essential, step in the waiver process does not inadvertently become the vehicle for unnecessary further delay. Such a result would not be in the public interest.

There is no reason for substantial additional delay. The Order clarifies the showings and conditions we expect the BOCs to meet. The Commission's staff has committed itself to making every effort to minimize the time required to complete its review of the supplemental filings.

I have a second concern. Primary among the justifications for granting these waivers has been the promise that collocation of basic packet switched network facilities and asynchronous to X.25 protocol conversion facilities will reduce the costs associated with information services, thus

[1] Pacific Bell filed this request on March 30, 1984.

bringing them within the means of a substantially larger segment of our society. I am concerned that we not lose sight of this primary goal. I urge the BOCs to identify more clearly the cost savings they hope to realize from collocation and to insure that these cost reductions are reflected in lower rates for users of their packet switched network. I shall work to insure that the Commission applies the safeguards announced today in such a way as to preclude the BOCs from realizing unfair (*i.e.*, non cost based) price advantages in the packet switching market, while simultaneously insuring that they are *allowed* to pass to the public any real efficiencies derived from collocation as expeditiously as possible.